THE OFFICIAL PUBLICATION OF THE NEW YORK STATE BAR ASSOCIATION'S COMMITTEE ON ANIMALS AND THE LAW

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From the Chair

Since becoming Chair of the Committee on Animals and the Law on June 1, I have become newly aware of the many stories on the ways in which animals are ever-present in our lives – from the recent article in the New York Times about the role that a puppy played in helping a child adjust to moving back and forth between her divorced parents' homes, to the one forwarded by Morning Ag Clips that reported on goats that are helping control wildfires in Ireland's hills by eating the low-lying gorse that fuel the fires. These animals and many others enrich our lives in untold ways. In this Committee, we work to support laws that ensure they are all properly treated, that their human companions are aware of the laws that provide those protections, and that the laws are enforced when animals are mistreated.

The Committee accomplishes very much of that work through the subcommittees that meet to discuss and implement programs that will help animals. This issue of Laws and Paws highlights the work of two of those subcommittees. The Legislation Subcommittee meets year-round to review legislation introduced in the New York State Legislature related to animals (over 250 bills since January), determine which of those bills should be supported or opposed by the Committee, and draft memoranda to express that support or opposition. To date in 2021, two bills supported by the Committee on Animals and the Laws have been signed into law, and several others are under consideration. They are all described in the 2021 report of the Legislation Subcommittee printed in this issue.

One of the challenges of working with legislation is finding a compromise path to accomplish a goal on which everyone

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Inside this issue:

agrees, when they don't agree on the best mechanism to achieve it. One of the bills supported by the Committee this year relates to a standard for determining possession of a companion animal in a separation or divorce. The NYSBA Family Law Section disagreed with our position, which is defended eloquently in the article written by Legislation Subcommittee Chair Stacey Tranchina and published here. We plan to work with the Family Law Section on this issue and on a new law that can be supported by everyone.

This Laws and Paws also has a report from the Special Projects Subcommittee, which looks into diverse topics related to animals and the well-being of the animals among us, in areas that are not covered by other subcommittees. The report from the subcommittee in this issue describes the current status of pet insurance in New York. It drives home the point that many of our companion animals will live long, healthy lives only if we properly care for them, and the most important part of that caring is regular veterinary medical care – which can be expensive – and pet insurance may help make it more affordable. The subcommittee is continuing to review the laws that regulate pet insurance in New York, and the potential for additional regulation of pet insurance in this state in the coming year. Until there is more specific regulation of pet insurance, the Fact Sheet on Pet Insurance put together by the Special Projects Subcommittee, also in this issue of Laws and Paws, will help anyone considering that purchase make a good decision. The subcommittee will work with veterinary practitioners, their professional society, and others to make the information in the Fact Sheet available to pet owners.

Members of both subcommittees have done tremendous work to bring you the information summarized in the subcommittee reports and other articles from both the Legislation Subcommittee and the Special Projects Subcommittee; I hope you will enjoy reading them.

You would not be reading any of it if not for the work done by the Publications Subcommittee, which designs and edits each issue of Laws and Paws. I am thankful for the work done by the members that subcommittee, and of all our subcommittees, which makes it possible for this Committee to continue its work each year on behalf of animals.

Barbara J. Ahern, Chair, NYSBA Committee on Animals and the Law

Barbara Ahern, Esq., Committee Chairperson
Charis Nick-Torok, Esq., Committee Vice-Chairperson
Kirk Passamonti, Esq., Secretary; Publications Subcommittee Chairperson
Cheryl Sovern, Esq., Publications Subcommittee Vice-Chairperson
Adam Lepzelter, Esq., Issue Co-Editor
Breanna Reilly Esq., Issue Co-Editor

***SPOTLIGHT ON*:**

THE SPECIAL PROJECTS SUBCOMMITTEE

Most pet owners are not aware that pet insurance is available, nor do they know what kind of insurance is best suited to their needs. The Pet Insurance Fact Sheet was created, for pet owners, to focus on the health aspects, i.e. veterinary care, of pet ownership. Veterinarians perform invaluable lifesaving services and, like physicians, incur great costs to provide such care; but unlike the coverage provided in human healthcare, many pet owners are without insurance to help defray the costs of an unexpected veterinary emergency. Moreover, Pet insurance can seem expensive, until an accident or illness strikes, and then it can be a blessing. Knowing the invaluable service the Committee on Animal's and Law (COAL) could provide by educating all pet owners, from colleagues to members of the public who might be otherwise unaware of the pet insurance option, the Special Project on Pet Insurance was created, and it is a wonderfully compelling and ongoing collaboration by our hard-working members, who have set aside other priorities in order to contribute their legal expertise to this important project.

Pet Insurance Fact Sheet.

In the early stages of the project, the Special Projects Subcommittee of COAL worked on sketching out helpful tips on pet insurance for pet owners and those expecting to be pet owners. Starting out, we knew one thing -- pet owners needed to know about the costs involved in having a pet. Simply stated, healthcare for pets, from veterinary examinations to laboratory tests to high-cost medications, is expensive. A pet is a living, breathing, organic being that will need healthcare throughout her/his life -- from the time the pet is very young until old age. Necessary health care includes vaccinations, spay/neuter surgeries, wellness checkups, illnesses, other surgeries, emergency care, medications and therapy, just to name a few items.

Pet insurance, while it requires monthly payments just like other types of insurance, can save a pet owner thousands of dollars over the lifetime of the pet- and ultimately could save a pet's life. No one wants to be in the situation where they must decline care for a beloved pet because they don't have the money to pay the veterinarian's bill.

The final Pet Insurance Fact Sheet incorporates the results of our research and provides information that pet owners should have in order to be aware that the insurance option exists. While pet insurance may or may not make sense in all instances, and may not always be an available option, pet owners should know what questions to consider in evaluating the various plans available. COAL's Pet Insurance Fact Sheet provides a general overview on how pet insurance works, answering questions like, who should get pet insurance? what is pet insurance? what are some things a pet owner should ask the insurance company before purchasing a policy? Although specific insurance companies are not included by name, and there is no endorsement of any particular policy, the fact sheet refers to provisions that are commonly found in these policies, and should be carefully reviewed. The fact sheet also has generalized information on payment plans and credit companies and how they differ from insurance plans. Critically important, the fact sheet instructs a pet owner on how to find out whether the insurance company

is authorized to do business in NYS. Minimally, before a pet owner considers purchasing any policy in New York, it is imperative that they make sure the company is authorized to do business in New York and licensed by the New York Department of Financial Services (DFS). If it is not, it is possible that a policyholder may lose some of the money paid in premiums if coverage is incomplete. Pet owners can research whether the company is authorized to do business in New York using the DFS link, available at: https://myportal.dfs.ny.gov/web/guest-applications/ins.-company-search?null=. When using the link, it is important to insert the corporate name of the pet insurance company, rather than the brand name that the company may use when marketing a specific pet insurance policy.

General Summary of Pet Insurance Coverage

Similar to the process used by companies providing health insurance policies for people, pet insurance companies charge for insurance coverage using actuarial tables to predict the life span of a dog or cat, and the propensity for certain illnesses, often relying on breed-specific information. Asking about this practice is a question a purchaser needs to explore with the company whose insurance they are considering. An actuarial study on the life span of dogs was conducted in Japan in 2017-2018; this study and other similar studies will be used by an insurance company to help adjust the amount you pay in insurance on the basis of the expected longevity of the breed(s) of dog or cat, where you live, and propensity of the breed(s) for illness.

Although pet insurance plans differ in what they cover, pet owners should be aware of some key points to consider when determining which plan may be better than another, based upon the pet owner's circumstances. Disparities between insurance providers may exist depending on items such as whether the plan has age limits. Some companies will refuse to insure pets over a certain age, while others may have no age limits, per se, but older pets will be subject to higher premiums on both accidents and illnesses, and preexisting conditions may not be covered. Other plans may not exclude specific breeds, and will cover hereditary conditions such as breed-related issues and surgeries, but may bar coverage for preexisting conditions.

Aside from differences in blanket exclusions based upon age or breed, pet insurance companies may impose specific restrictions or criteria that limit the circumstances that trigger the policy coverage. For example, some companies provide assistance for wellness visits and emergencies with few restrictions, while others may require advance notice of any veterinary visits, regardless of the circumstances, to avoid having the claim rejected. Additionally, pet owners should inquire whether the plan has any monetary payout caps for each claim, or over the lifetime of the pet, beyond which the plan will no longer provide coverage.

New York Specifics: NY Law Does Not Currently Address Pet Insurance

New York under current law regards pet insurance as property and casualty insurance[1], as do most states; consequently, there are no specific provisions in the Insurance Law or the Regulations of the Department of Financial Services that are specific to pet insurance.

Legislation to change that situation has been introduced in 2021 (and prior years) that would add specific provisions to the Insurance Law to regulate pet insurance:

- S.1678 (Skoufis) / A.7051 (L. Rosenthal) adds a provision to the Insurance Law providing that pet insurance policies shall not contain any exclusion or limitation on a pet's pre-existing condition. This bill has been introduced in the Senate since 2019 and is newly introduced in the Assembly in 2021; there has been no legislative action on it to date.

- A.3711 (L. Rosenthal) would add a new Article 42-A to the Insurance Law, with new comprehensive provisions applicable to any pet insurance policies offered for sale in New York State. The bill requires that a policy include mandatory disclosures, and would also include mandatory coverage, in all pet insurance policies, of pre-existing conditions, congenital anomalies, hereditary disorders and chronic conditions. The legislation also regulates the deductibles and co-payments required by any such policy, the waiting period built into many pet insurance policies, the procedure for determining and reviewing claims payments, renewal procedures (renewals cannot be denied based on claims history or age of the covered animal), and prohibits premium increases based on claims history. Significantly, it also provides that coverage shall be continuous so long as premiums are paid, regardless of any change of ownership of the covered animal, and that each policy of pet insurance is to be transferable and assignable to a new owner of the covered animal. By avoiding the need for a new owner to commence a new policy, the bill would, in addition to assuring continuous coverage for the animal, provide significant economic relief to pet owners, which is especially important for low and modest income adopters of shelter and rescue animals who often incur significant veterinary bills, and facilitate the transition of insurance upon the death of the pet owner. This bill, which does not yet have a Senate sponsor, has been introduced in the Assembly in each year since 2015 (albeit in somewhat different form in the earlier years), but there has been no legislative action on it in that time period.

There may be a new bill introduced in the next year, based on the model bill on pet insurance that is currently being developed by the National Association of Insurance Commissioners (NAIC).

[1] At the present time, all animals, including companion animals, are regarded as property and, consistent with this view, insurance for them is classified as property and casualty insurance.

MODEL LAW: The NAIC Model Pet Insurance Act[1]

In 1982 the first pet insurance policy in the United States was issued by Veterinary Pet Insurance (VPI), a veterinarian-owned California company that enjoyed the lion's share of the nascent pet insurance market for the better part of two decades.[2] Today, the American pet insurance marketplace is comprised of about 20 companies insuring over 3 million pets with a reported total U.S. premium volume exceeding $2 billion.[3] Over 100 million American households harbor one or more canine or feline companions,[4] and the pet insurance market continues to experience double-digit growth at an average annual rate of 24.2% between 2016 and 2020.[5]

In 2014 the State of California enacted the first and, to date, the only consumer protective statute governing the pet insurance business.[6] A comprehensive New York pet insurance bill was introduced, but not enacted, in 2015-16, 2017-18, 2019-20 and in the current 2021 legislative session.[7] The volume of pet insurance policies sold in New York is second only to California's market share and the apparent justification for consumer oriented legislation remains as stated in the Assembly 3, 4 and 6 years ago:

> *"Currently, the pet insurance industry is completely devoid of any regulation. Pet insurance companies are given wide latitude to charge different rates . . . utilize*

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[1] The term "pet insurance" refers to products commonly covering dogs and cats indemnifying the costs of the pets' veterinary medical treatment.

[2] *See* NAIC white paper, A Regulator's Guide to Pet Insurance, ©2019 National Association of Insurance Commissioners, https://content.naic.org/sites/default/files/publication-pin-op-pet-insurance.pdf.

[3] *See* North American Pet Health Insurance Association (NAPHIA), *State of the Industry (SOI) Report 2021.*

[4] According to the 2019-2020 American Pet Products Association (APPA) National Pet Owners Survey (http://americanpetproducts.org/pubs_survey.asp), almost 64 million U.S. households own a dog and another 43 million have one or more cats in residence. And many Americans adopted or bought companion animals during the extended pandemic lockdowns. According to an article in the Claims Journal, over the past year dog inquiries on Petfinder rose by 36% (http://www.claimsjournal.com/news/national/2021/03/26/302803.htm).

[5] *See* the NAPHIA, *SOI Report 2021.*

[6] California Insurance Code, Division 2, Part 9, 12880 – 12880.6 (*Stats. 2014, Ch. 896, Sec.1, as amended.*)

[7] New York Assembly Bills A.3594 (2015-16), A.2357-B (2017-18), A.2976 (2019-20) and A.3711 (2021-22).

their own definitions of terms such as "veterinary expense" and "pre-existing condition" that may vastly differ from their competitors . . . [t]his bill would protect consumers by establishing uniform definitions for common terms; require insurers to disclose whether the policy excludes coverage for pre-existing, hereditary or chronic conditions; require that a summary description of themethod used to determine claim payments be provided; and allow consumers to return the policy within 30 days if no claim has been paid out."[8]

[8] *Id.* The proposed legislation would also authorize the adoption of regulations to implement the bill's purpose, including enforcement proceedings and civil penalties.

Following publication of its 2019 white paper, *A Regulator's Guide to Pet Insurance*, a pet insurance working group within NAIC's Property and Casualty Insurance Committee was charged with the goal of developing "a model law to establish appropriate regulatory standards for the pet insurance industry."

The most recent, albeit not final, draft of the Pet Insurance Model Act, is the product of numerous edits. Original sections addressing *violations* and *licensing* respectively, have been excised in apparent recognition of state jurisdiction to authorize and regulate insurance products sold within its boarders. Not unimportantly, the *definitions* and *disclosures* sections of the Model Act are, essentially, what remains of the draft.

As defined in the Model Act, "'*Pet insurance'* means a property insurance policy that provides coverage for accidents and illnesses of pets.'"

The Model Act defines preexisting conditions and renewal as follows:

"E. *'Preexisting condition'* means any condition for which any of the following are true prior to the effective date of a pet insurance policy or during any waiting period:

i. A veterinarian provided medical advice;
ii. The pet received previous treatment; or
iii. Based on information from verifiable sources, the pet had signs or symptoms directly related to the condition for which a claim is being made.

A condition for which coverage is afforded on a policy cannot be considered a pre-existing condition on any renewal policy."

"J. *'Renewal'* means to issue and deliver at the end of an insurance policy period a policy which supersedes a policy previously issued and delivered by the same insurer or affiliated insurer and which provides types and limits of coverage substantially similar to those contained in the policy being superseded.

As contained in California's statute – and in New York's unadopted effort – a greater portion of the Model Act addresses the *disclosures* that insurers transacting pet insurance must disclose to consumers, including *inter alia,* disclosing important coverage exclusions due to (a) a preexisting condition, (b) a hereditary disorder, (c) a congenital anomaly or disorder, and (d) a chronic condition.[9]

There are a number of other important disclosure requirements set out in the Model Act, e.g., (1) whether the insurer reduces coverage or increases premiums based on the insured's claim history, the age of the covered pet or a change in the geographic location of the insured; (2) providing a summary description of the basis or formula on which the insurer determines claim payments within the insurance policy *prior* to policy issuance and through a clear and conspicuous link on the main page of the insurer or insurer's administrator's internet web site; (3) if claim payments are based on "usual and customary fees" or some other reimbursement limitation based on prevailing veterinary provider charges, describe the insurer's basis for determining "usual and customary" fees and how that basis is applied in calculating claim payments and further disclose that basis through a clear and conspicuous link on the main page of the insurer or insurer's administrator's internet web site.

The Model Act also requires that the pet insurance policy shall contain a notice clearly stating that after the insured's receipt of the policy, the policy may be returned by written notification to the insurer or selling agent. This so-called *"free look"* period shall be not less than 30 days and all premiums paid shall be refunded to the insured within 30 days following notification. An insurer's payment of any claim during the free look period serves to render the 30-day free look "right" inapplicable.

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[9] These required disclosures are borrowed directly from the California Code. New York's proposed pet insurance law had a more aggressive consumerist approach by *banning* the issuance of policies that exclude coverage for either, preexisting conditions, hereditary disorders or chronic conditions.

We can anticipate that the final version of NAIC's Pet Insurance Model Act will closely approximate the working committee's most recent (mid-2021) draft. After it is finalized and adopted by the NAIC Executive Committee/Plenary, NAIC will encourage state legislatures to adopt the model law, with as few changes as possible, to encourage uniformity in regulation of pet insurance across the country. With their vote in favor of a model law, a state's insurance commissioner (in NY, the Superintendent of the Department of Financial Services) agrees to devote the resources of their department to encourage passage of the model act by their state's legislature. Any guidance ultimately afforded through the NAIC template will hopefully serve to generate the necessary legislative action to fill a current regulatory void.

Financing Alternatives to Pet Insurance

While a Pet Insurance Model Act is being considered, think about shifting mindsets towards the financial responsibilities of animal companionship. Many of us currently self-insure our animal companions: we pay for health care costs when those costs arise. We could all benefit from beginning that financial process when an animal joins us rather than later in an animal's life. National pet insurance companies authorized to sell insurance in New York give premium quotes ranging from $110 to $150 a month for a policy on an eight-month-old dog. Deductibles on those policies appear to range from $150 to $300 a month.

Assuming that a human companion chose a policy with a $117 per month payment and a $200 deductible and no care costs were incurred, the animal owner would pay the insurance company $1,521 in premiums over the first year of coverage. If the policy was used to care for the dog, the owner could have paid $1,721 before the insurance policy would cover any costs. If the owner instead invested the monthly premiums in a money market fund, at least $1,521 would be saved for future dog healthcare. Assuming a 4% rate of return after fees on the money market fund, by the end of the three years a human companion could have paid $4,212 in insurance premiums or have around $4,482 saved for a canine companion's future.

If an insurer refuses to renew, the funds are gone just when an animal companion might most need healthcare. If invested by the owner, that money could go towards caring for an animal companion. Irrespective of whether more states follow California's lead by regulating insurance for animals bought by their owners, we might all benefit from considering financial planning for our animal companions early. As long as the amounts used from investments made can be attributed to investments made more than a year earlier, those distributions will qualify for long-term capital gain treatment.

Figure 1. Insurance

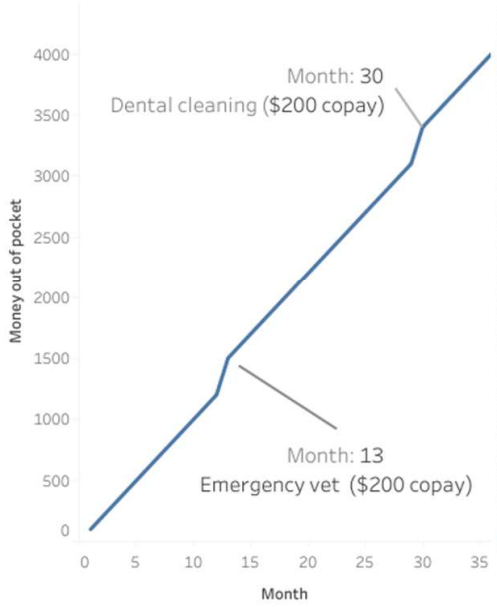
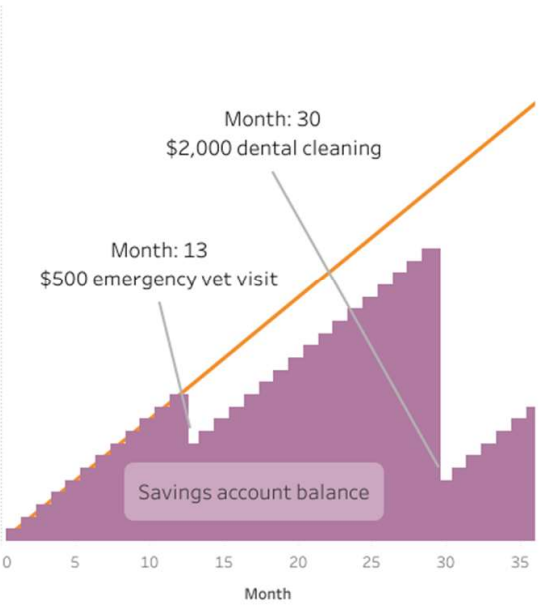


Figure 2. Savings



Thanks to Robert Phillips for modeling and James R. Hietala Jr. for graphics

It is important to consider as well that pet insurance may not only assist pet owners in defraying the costs of veterinary care, but also assist veterinarians who are constrained by financial limitations of pet owners, and sometimes unable to provide the extensive care pets may need due to the financial burdens it might impose on the pet's owners.

A Veterinarian's View
Offered by: Bridget Barry, DVM[10]

As a veterinarian, I would love it if more of my patients had medical insurance, and then money would play less of a role in determining treatment plans, diagnostics, and preventative care. More patients with catastrophic diseases and injuries would be able to get the emergency care they need. Patients with chronic diseases would be able to get the best care possible so they can live the longest life possible with the highest quality. Every day, veterinarians are forced to make compromises in the care that they provide for their patients because of client financial constraints. Nothing is more heartbreaking than having to euthanize beloved patients and pets because clients cannot afford to continue medical care. Knowing a client has insurance for their pet allows veterinarians to breathe a sigh of relief and concentrate on doing what is best for their patients, rather than just doing what their clients can afford. It also allows clients to take their pets to a veterinarian at the first sign of an illness, rather than waiting until the problem gets more serious and difficult to treat, or possibly becomes no longer treatable.

[10] Dr. Bridget Barry is a veterinarian in private practice who participates in the NYSBA Committee on Animals and the Law as an advisor to the Committee.

It would be so helpful to veterinarians to have a brochure that can be shared with clients that is not just a promotion for a particular company, but something to really help educate and guide them into making the best choices for their pets. It would allow veterinarians to concentrate on diagnosing and treating patients and educating their owners about the best care practices, with finances playing less of a role in care choices.

The level of veterinary care that people want for their pets has increased significantly over the past few decades. Pets are receiving higher levels of wellness care, diagnostics, treatments, specialty care and surgical care. As a result, veterinary medicine has gotten more expensive, and the cost will continue to go up as the expected level of care continues to increase. Pet insurance will become more and more of a necessity in the future.

If veterinarians had a really good informational resource on pet insurance to share with clients, to help guide them to the best policy for their pet, then I believe that many more pets would be insured and would be able to receive the care they need.

The Pet Insurance fact sheet from the NYSBA Committee on Animals and the Law is a great resource for veterinarians and their clients.

CONCLUSION

The overview provided here on pet insurance, in general, serves as a precursor to the information provided by the Pet Insurance Fact Sheet. While the pamphlet does not discuss specific pet insurance companies, it does provide pet owners a much needed starting point for evaluating the services and coverage, benefits and potential alternatives to insurance that an owner should consider, before an emergency occurs.

Created by the
NYSBA COMMITTEE ON ANIMALS AND THE LAW
SPECIAL PROJECTS SUBCOMMITTEE
Chair: Nancy Volin, Esq.
Vice-Chair: Amy Pontillo, Esq.

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Ad Hoc Members: Barbara Ahern, Esq.; Bridget Barry, DVM; Jack Fein, Esq., MD; Cheryl Sovern, Esq.; Charis Nick-Torok, Esq.; Kirk Passamonti, Esq.

PET INSURANCE – FREQUENTLY ASKED QUESTIONS

Introduction

This pamphlet has been prepared by the NYS Bar Association's Committee on Animals and the Law to answer some of your questions about pet insurance. Whether you have just adopted your first shelter puppy, kitten, or older pet, are purchasing from a breeder, or you are an experienced pet parent considering the purchase of pet insurance for the first time, this pamphlet may provide you with answers to the questions you should ask.

Who should get pet insurance?

- Anyone who owns a cat or dog.
- Anyone looking for peace of mind regarding their pet's future medical expenses.

What is pet insurance?

- Pet insurance is a type of insurance where pet owners purchase a policy and pay a monthly premium; the insurance provides reimbursement of their pet's medical expenses and assistance with managing the health, wellness, and medical costs for their pets.
- Pet insurance policies usually cover routine veterinary needs, such as annual wellness visits and preventive care, including vaccinations for rabies.
- Some pet insurance policies will also provide you with financial reimbursement for your pet's unexpected veterinary needs, arising from accidents or illness, which could require diagnostics, surgery, emergency care, medications, and follow-up care.
- You should consider buying pet insurance to be sure you can afford to protect your pet family with appropriate veterinary medical care, just as you have medical insurance to cover medical expenses for yourself and your family.
- You will want to consider what amount you can afford to pay for pet insurance and find a plan you can afford with financial benefits that are valuable to you and your pets.

When should you start thinking about pet insurance?

- When you start thinking about getting a pet, you should also think about pet costs for pet care and veterinary visits, even just annual wellness checkups, can add up quickly. Young pets, like puppies and kittens, need routine care, while older pets are more likely to develop medical conditions that require regular, and more expensive, veterinary treatment and medications.
- The best time to get insurance for a pet is when your pet is under one year of age, because policy premiums for pets of that age are lower than premiums for an older pet. Many policies exclude costs related to pre-existing conditions, so if you wait until your pet is diagnosed with a serious illness (for example, cancer), then all future treatments for that known medical problem can be excluded from insurance reimbursement.
- Pet insurance can also provide you with financial reimbursement for veterinary bills suddenly incurred by a younger pet in the event of an accident or unexpected illness.

What are the different kinds of pet insurance?

- There are pet insurance policies that cover routine annual care (i.e., wellness visits that include an annual physical exam) and any annual vaccinations or preventive medications needed by your pet. While these plans may provide reimbursement for preventive care and vaccinations, they may not cover catastrophic events such as serious illnesses and accidents.
- There are also "catastrophic" policies that protect against unexpected events, such as serious illnesses and injuries. These policies may have a deductible and/or co-pay, just like human medical insurance, but may not cover routine, annual care, or vaccinations.
- You should determine what kind of coverage you want and how much you are willing to pay each month. Be sure to choose a policy you can afford; non-payment of premium will cause the company to cancel your policy, and reinstatement may be more expensive than your original policy.

Why should you consider getting pet insurance?

Pet insurance is intended to help pet owners pay for the veterinary medical care needed by their pets to ensure that they live long, healthy lives. If you are concerned about the cost of regular veterinary care, or the potential cost of care for an illness, injury, or accident that your pet may suffer, the financial reimbursement provided by pet insurance should provide you with assurance that you will be able to afford necessary veterinary medical procedures and medications, because much of the cost will be reimbursed to you by the pet insurance company.

- Reimbursed Costs: Veterinary care can be expensive; the cost of care varies greatly by area and will be more expensive in an urban area than in a rural area.
    - A typical wellness visit to a veterinarian, which includes a physical exam, runs from $50–$100; annual vaccinations are an additional cost.
    - If your pet is sick, diagnostic tests such as blood tests, X-rays, or ultrasounds will likely be hundreds of dollars.
    - If your pet needs surgery or hospitalization, your veterinary bill can easily add up to thousands of dollars.

How does pet insurance work?

- Generally, a pet owner will pay a monthly premium to an insurance company, based upon the insurance plan you choose. You would then pay your veterinarian directly for each visit, and submit your bill to the insurance company, which will reimburse you based on the reimbursement schedule you have chosen.
- In some instances, your veterinarian may have a contract with your insurance company; then the insurance company will pay the veterinarian. If this is important to you, you can research participating veterinarians on the insurance company's website.

What are things you should look for/ask the insurance company when looking at insurance for your pet?

- What kinds of policies are available, and what are the differences?
    - Comprehensive coverage, or "nose to tail." This kind of policy will cover just about everything: medical bills for accidents and injuries, serious or chronic illness, hereditary conditions, diagnostic tests, surgeries, treatments, and wellness, such as routine veterinary checkups and vaccinations.
    - Accident and illness: accidents (like a broken bone) and illnesses, including common illnesses, hereditary conditions, and serious illness (like cancer).
    - Accident-only coverage provides coverage when your pet is injured in an accident, but you will not be covered for illness-related medical bills.
    - Pet wellness coverage provides coverage for routine veterinary checkups, flea and heartworm prevention, and you can often add wellness benefits to an accident and illness plan.
    - Physical therapy/other therapy treatments: treatments that originated in human medicine, such as physical therapy and other rehabilitation therapies, are now being offered to animals; they may or may not be covered by a pet insurance policy. Ask whether the insurance plan covers therapy at an animal rehabilitation therapy center after an orthopedic procedure or any other type of trauma, or any other therapy, such as laser therapy, that may be offered to a pet.

What is the highest annual amount the company will pay? (What are the caps?)
Is there an annual deductible that must be met before the insurance will provide reimbursements for medical costs? Is there a co-pay for each visit?
Does the insurance company have a proven customer service team and claims process, or 24-hour customer service representatives to answer questions in an emergency?
Does the policy have an age limitation? Will the coverage end after a pet reaches a certain age?
Will the premiums be based on a pet's breed or on your location?
Are there discounts for insuring more than one pet?
Exclusions (plain language: what costs, medical conditions or treatments are not covered, and will not be reimbursed by the insurance company?) All insurance companies licensed to sell policies must provide disclosures about items that are not covered by their insurance However, there are currently no specific requirements or regulatory guidance concerning pet insurance disclosures, thus **the disclosure language in a pet insurance policy is not always very clear. Read the policy carefully – both the original policy and any renewal policies– and look for the following exclusions:**

- Pre-existing conditions. Has your pet been injured or sick in the past? Will the insurance cover a recurrence of any pre-existing conditions?
- Breed-specific. Certain breeds are known for having certain ailments, such as spinal problems, hip dysplasia, skin conditions, ear infections, or other medical problems. Some breeds may have a pre- disposition to develop, for example, a heart condition later in life. You should ask the insurance provider whether the policy will cover inherited conditions, and if there are any conditions excluded for your breed of pet. You should also ask if coverage of your breed is more expensive than the average policy, or if there is a different rate for that breed.

- Bilateral condition. If your pet has a particular condition, such as hip dysplasia, or cataracts, which may occur a second time on the other side of the body, ask about bilateral condition coverage. Some policies exclude reimbursement for a second occurrence of the same condition, even if it is at a different location (other hip, other eye). Some policies may exclude a second occurrence as a pre-existing condition if the first problem occurred prior to the purchase of the insurance policy.
- Will the premium increase as your pet ages or if you change your geographic location?
- Will your coverage terminate when your pet reaches a certain age?

Does pet insurance only cover dogs and cats, or will it also cover birds, reptiles, and other pets? (Most companies only insure dogs and cats.)

Additional considerations

- Your homeowner's or renter's insurance may also provide an optional pet insurance. Ask your insurance company if that coverage is available through your existing policy, and if the pet insurance is provided directly, or through a partnered insurance company. If it is a partner insurance provider, compare that insurance with other plans, and choose the one that is right for you **and** your pet.
- If you are obtaining your pet from a breeder, another option for you is to inquire if the breeder participates in a pet insurance program that will insure your pet.
- Payment plans and credit companies.
  - Many veterinarians offer their own wellness program or payment plans; these programs are different from insurance.
  - These are agreements, or contracts, between you and your pet's veterinarian to either have a prepaid fund or pay off a bill in stages.
  - You may choose to start your own savings account to fund any large veterinary costs incurred by your pet, similar to an FSA or HSA account, but an account to pay veterinary costs is not deductible and does not have any of the financial advantages of an FSA or HSA account.
  - Many veterinary offices offer clients an opportunity to pay a large bill through *Care Credit*; this program is **not insurance** and is different from insurance.
    - *Care Credit is a credit card. It does not provide any reimbursement for medical expenses; it does help a pet owner pay for expensive medical care over a period of months instead of paying for the entire bill at the time the care is provided. Like credit cards, Care Credit and other similar programs may charge interest after an initial interest-free period, so you should compare the Care Credit offer with the cost, plus interest, of using your existing credit card. And, like all credit cards, nonpayment of a Care Credit bill could be reported to credit reporting agencies and may have a negative impact on your credit rating.*

What are the legal provisions concerning pet insurance?

- All insurance companies selling policies in New York State must be licensed by the New York Department of Financial Services (DFS) and authorized to do business in New York; DFS provides a list of insurance companies that are licensed in New York.
- The list of authorized insurers is available at the DFS link below. Be sure to type in the corporate name of the insurance company, which may be different from the brand name they use to market a pet insurance policy: https://myportal.dfs.ny.gov/web/guest-applications/ins.-company-search?null
- Important: Do not purchase insurance from a company that does not appear on the list of licensed insurers authorized to do business in New York If your insurer is not authorized to do business in New York, you will not have the protection guaranteed by the DFS licensing system; you risk getting incomplete coverage and loss of the money you paid in monthly premiums.

How do I get started?

- If you already have a pet and a veterinarian, talk to your veterinarian, or visit the veterinary practice's website; they may have recommendations.
- Search online for pet insurance companies; some consumer services will compare different plans and rate the plans for you; use this fact sheet as your guide as you do your research. Be sure you are looking at insurance companies licensed in New York State.
- Compare pet insurance policies to assess what is covered, what is excluded, and what you can afford to **comfortably** pay, so you will not risk losing coverage due to nonpayment of premiums.

To purchase physical copies of the NYSBA LEGALease pamphlet containing these frequently asked questions (sold in packs of 50), please visit: https://nysba.org/products/pet-insurance-frequently-asked-questions-legalease-pamphlets/

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WITH ALL DUE RESPECT, YOUR HONOR, WE DON'T WANT TO EQUITABLY DIVIDE THE FAMILY PETS *or*

SOLOMON AND THE FAMILY PET – A FAILURE OF EQUITABLE DISTRIBUTION RUBRICS - BY STACEY TRANCHINA

When a marriage is being dissolved, how do family pets/companion animals fit into New York State's equitable distribution laws (D.R.L. §236 (B)(5)) which are intended to yield an equitable distribution of jointly held or acquired marital assets (and liabilities) of both parties?[1] Lacking the wisdom of Solomon when faced with determining which of two women was the true mother of the child (1 Kings 3:16-28), courts have struggled to answer this question for years, often yielding inconsistent results. Recognizing this uncertainty and seeking to provide judges with a uniform standard for deciding which party should be awarded possession of a companion animal, Senator Skoufis and Assemblymember Glick introduced S.4248/A.5775 in the 2021[2] legislative session ("the Bill"). The Bill was passed by both houses of the Legislature, but as of this writing, has not been delivered to the governor, and there is no indication when it will be delivered to Governor Hochul for her signature or veto before the end of the year.

A statutory standard for deciding possession of a couple's jointly owned animal is desirable because it will assist judges faced with the issue and simplify their decision making process by creating a uniform standard for this determination, but the Bill in its current form is imperfect. Its language, "best interest of such [companion] animal," is not workable when the subject of the custody dispute is an animal, and moreover, it does not promote judicial efficiency.[3] The Bill's inclusion of this proposed standard is unfortunate because courts already have fashioned a standard, "the best for all concerned," which the bill's sponsors could have used.

As explained herein, while such a standard has been judicially created, which is a positive development, it has not been followed uniformly and actually has been rejected, even by trial courts in the same jurisdiction. Thus, while it may be helpful to judges who choose to apply it

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[1]The exact same question arises when non-marital relationships end, leaving the fate of jointly acquired pets to be resolved by courts as well. The only difference is that if the parties are not married, they must seek possession of the companion animal by bringing an action for replevin, as judges have observed. *Travis v. Murray*, 42 Misc.2d 447, 452, 977 N.Y.S.2d 621, 626 (Sup. Ct. New York County 2013) ("Replevin is the means by which non-matrimonial actions regarding ownership and possession of dogs have generally come before New York courts.") For this reason, often in replevin actions judges look to and rely upon cases decided under the Domestic Relations Law because the issues presented are identical, and there has been a parallel development of case law in both replevin actions and equitable distribution actions.

[2]Although this bill was first introduced in 2019, S.6222 (Martinez) / A.1097 (Glick), it was not passed by both houses of the Legislature until the 2021 Legislative session.

[3]In fact, the Family Law Section has recently taken this exact position in its article "Best Interests of the Hamster? A False Equivalency and Absurdity in Proposed Pet Custody Legislation" by Lee Rosenberg (Latest News 8/25/2021). However, The Committee on Animals and the Law disagrees with that article's premise that legislation is not needed in this area because courts already have fashioned a "best for all concerned" standard.

and the pets that benefit from such application, in actuality the "best for all concerned" standard is not a well entrenched, uniform standard applied consistently in this area of law. The Committee on Animals and the Law is strongly of the conviction that such uniformity, which will be created by a statute (or a decision of the Court of Appeals), is needed in this area: 1) To facilitate and simplify judges' decision-making process thereby preserving judicial resources; 2) To preserve litigants' financial resources by giving them a uniform and known standard that will govern their dispute; and 3) To ensure that the fate of animals at the heart of custody disputes will be determined by a sound and predictable standard appropriate for matters involving beloved family pets, which unlike a chair or a table, are sentient beings despite sharing the same 'property' status under the law. For these reasons, the Committee on Animals and the Law submitted a memorandum to the governor supporting the bill and supporting the establishment of a single statutory standard but urging the governor to sign it on the condition that the sponsors agree to introduce a chapter amendment during the 2022 legislative session to modify the language of the bill, replacing "best interest of the animal" with the developing, judicially created "best for all concerned" standard.[4]

Most parties to an action involving animals would agree that companion animals cannot be treated and valued in the same manner as other material assets, and that strict rules of property law should not apply to them. Many judges have concurred, as did Judge Seymour Friedman in the frequently quoted case, *Corso v. Crawford Dog and Cat Hospital, Inc.,* 99 Misc.2d 530, 531, 415 N.Y.S.2d 182, 1825(Civ. Ct., City of N.Y., Queens County 1979), who stated, "a pet is not just a thing but occupies a special place somewhere in between a person and a piece of property." This sentiment is reflected in New York State statutes promoting animal welfare, regulating how animals must be treated, and criminalizing cruelty to animals. For example, Agriculture and Markets Law §§ 353 and 353-a prohibit cruelty to animals, section 355 prohibits abandoning an animal in your care, section 353-b mandates that that dogs left outside have access to weather appropriate shelter and Family Court Act §842(i) allows courts to include companion animals in Orders of Protection. No similar laws require people to care for their personal belongings in a particular way or prevent their destruction.

While some courts have expressly recognized that animals are not merely inanimate personal property and refused to treat them as such,[5] it is axiomatic that animals also have not

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[4] This memorandum can be found on the Government Relations portion of the NYSBA's website, https://nysba.org/2021-and-2022-legislative-memoranda/ in the section devoted to the Committee for Animals and the Law, where it is identified as Memorandum #16.

[5]Courts have increasingly refused to apply basic principles of property law to companion animals in cases involving a variety of areas of law. They include:domestic relations law, *Travis v. Murray*, 42 Misc.2d 447, 456, 977 N.Y.S.2d 621, 628 (Sup. Ct. New York County 2013) ("[I]t can be concluded that in a case such as this, where two spouses are battling over a dog they once possessed and raised together, a strict property analysis is neither desirable nor appropriate."); tort law,*Corso v. Crawford Dog and Cat Hospital, Inc.,* 99 Misc.2d 530, 415 N.Y.S.2d 182, 1825 (Civ. Ct., City of N.Y., Queens County 1979) (Damages awarded beyond market value of the dog when the body of plaintiff's dog was not returned in its casket but was replaced with the body of a cat);contract law, *Hennet v. Allan*, 43 Misc.3d 542, 981 N.Y.S.2d 293 (Sup. Ct. Albany County 2014) (Recognizing "a more recent trend . . . to treat companion dogs as more than just property,"and holding that a release which referred to "personal property" did not extend to

been granted the same rights and protections accorded to humans under the law. Thus, neither rules for the equitable disposition of material assets nor rules pertaining to the custody of children are appropriate for or even useful to courts in making animal custody determinations. A logical and inescapable corollary is that a standard equivalent to the "best interest of the child," applicable in child custody determinations, should not be employed in making companion animal custody awards,[6] for a variety of reasons. They are set forth by the Committee on Animals and at the Law in its Memorandum of Support to the governor referenced *supra* and discussed below.

Initially, this standard is unsatisfactory because it requires a subjective analysis of a companion animal's "best interest," an idea that is problematic at best. In *Travis v. Murray*, 42 Misc.2d 447, 457, 977 N.Y.S.2d 621, 629 (Sup. Ct. New York County 2013), Justice Matthew Cooper rejected the idea that a "best interest of the animal" standard should be applied, stating, "[h]owever strong the emotional attachments between pets and humans, courts simply cannot evaluate the best interests of an animal." Justice Cooper elaborated:

> [I]t is impossible to truly determine what is in a dog's best interests. . . [T]here is no proven or practical means of gauging a dog's happiness or its feelings about a person or a place other than, perhaps, resorting to the entirely unscientific method of watching its tail wag. The subjective factors that are key to a best interests analysis in child custody—particularly those concerning a child's feelings or perceptions as evidenced by statements, conduct and forensic evaluations—are, for the most part, unascertainable when the subject is an animal rather than a human.

Id., at 460, 631, quoted most recently in *Finn v. Anderson*, 64 Misc.2d 273, 276, 101 N.Y.S.3d 825, 827 (City Court, New York, Chautauqua County 2019), a replevin action involving a cat.

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parties' dog); and even in the context of property law in replevin cases, *Feger v. Warwick Animal Shelter*, 59 A.D.3d 68, 72, 870 N.Y.S.2d 124, 126 (2d Dept. 2008) (Discovery dispute arising out of action against animal shelter seeking to recover a cat, which allegedly was stolen by an employee of the animal shelter which ultimately arranged for her adoption to another family, recognizing that companion animals are a "special category of property [which] is consistent with the laws of the state and the underlying policy inherent in these laws to protect the welfare of animals."); *Finn v. Anderson*, 64 Misc.2d 273, 278, 101 N.Y.S.3d 825, 828 (City Court, New York, Chautauqua County 2019) ("While it appears that the Appellate Division, Fourth Department, has not addressed the issue, this Court concludes that it is time to declare that a pet should no longer be considered 'personal property' like a table or car."); *Stoddard v. VanZandt*, 2013 N.Y. Slip Op. 51175(U) at 2, 40 Misc.3d 1213(A), 975 N.Y.S.2d 712 (Sup. Ct., Rensselaer County 2013)("It is commonly accepted that animals are not personal property as defined by New York Personal Property Law Section 1. In fact, cats fall into the category of companion animals which entitles them to special protections under New York Law.").

[6]As set forth above, The Committee on Animals and the Law agrees with the Family Law Section, which has recently taken this exact position in its article "Best Interests of the Hamster? A False Equivalency and Absurdity in Proposed Pet Custody Legislation," by Lee Rosenberg (Latest News 8/25/2021).

Secondly, because there already exist well known procedures to decide the best interests of a child,[7] the temptation maybe to employ at least some of those to ascertain the "best interest of a companion animal." For instance, a truncated forensic analysis could include interviews with veterinarians, pet sitters, family members and other people having significant contact with the companion animal and the parties in the custody dispute. Or one could argue for the appointment of a guardian of the companion animal to represent the animal's best interests, equivalent to a guardian *ad litem* in child custody cases. This approach would be ill advised because it would involve huge expenditures of judicial resources and the financial resources of the parties, the prospect of which has been soundly judicially rejected as "unthinkable." *Travis v. Murray*, 42 Misc.2d 447, 459, 977 N.Y.S.2d 621, 631 (Sup. Ct. New York County 2013) ("Obviously the wholesale application of the practices and principles associated with child custody cases to dog cases is unworkable and unwarranted.").

Thus, courts which have rejected the subjective "best interest of the animal" analysis also refused to apply a straight property law standard[8] and have fashioned an approach that allows for the objective analysis of the "best interest of all concerned," i.e., the people and the companion animal. The first case to use such a standard was *Raymond v. Lachman*, 264 A.D.2d 340, 695 N.Y.S.2d 308-09 (1st Dept. 1999), in which the Appellate Division reversed a lower court's apparently strict application of property principles, and holding,

> Cognizant of the cherished status accorded to pets in our society, the strong emotions engendered by disputes of this nature, and the limited ability of the courts to resolve them satisfactorily, on the record presented, we think it best for all concerned that, given his limited life expectancy, Lovey, who is now almost ten years old, remain where he has lived, prospered, loved and been loved for the past four years.

(Emphasis added.) Unfortunately, that decision contained little other guidance concerning factors to be considered in evaluating the best for all concerned.

However, a more recent trial court decision, *Travis v. Murray*, 42 Misc.2d 447, 456, 977 N.Y.S.2d 621, 628 (Sup. Ct. New York County 2013), contains a thorough and well reasoned discussion of the best for all concerned standard. Justice Cooperbegan by observing that the "'de-chattelization' of household pets" in *Raymond v. Lachman*, 264 A.D.2d 340, 695 N.Y.S.2d 308 (1st Dept. 1999), "[wa]s a clear statement that the concept of a household pet like Lovey being mere property is outmoded," and that *Raymond v. Lachman* laid the ground work for "employ[ing] a new perspective for determining

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[7]Such procedures may include ordering a forensic analysis, pursuant to Family Court Act §251, of the child's past and current situation, including conversations with the child and other people involved in the child's care, or appointing a guardian *ad litem* to represent the best interest of the child pursuant to §249 of the Family Court Act.

[8]Some courts have continued to apply a pure property law analysis, such as *C.R.S. v. T.K.S.*, 192 Misc.2d 547, 549, 746 N.Y.S.2d 562, 570 (Sup. Ct. New York County 2002), in which the dog, which was marital property, was treated purely as chattel, subject to the rules for equitable distribution under D.R.L. §234, allowing the court to award possession of every kind or property.

possession and ownership of a pet, one that differs radically from the traditional property analysis." *Travis v. Murray*, 42 Misc.2d 447, 455, 977 N.Y.S.2d 621, 628 (Sup. Ct. New York County 2013).

The court continued, "[t]he factors touched upon in the decision include the concern for Lovey's well-being as an elderly cat and the special relationship that existed between him and the person with whom he was living, a relationship that was described, rather nicely, as one where Lovey was 'loved and been loved'. In making its determination to keep Lovey in his present home, the First Department apparently concluded that the intangibles transcended the ordinary indicia of actual ownership or right to possession such as title, purchase, gift and the like." *Travis v. Murray*, 42 Misc.2d 447, 455-56, 977 N.Y.S.2d 621, 628 (Sup. Ct. New York County 2013).

Similarly, Justice Cooper stated that he would include typical property related ownership concepts, such as the source of the funds used to purchase the dog or whether the dog was received as a gift, as only one factor in determining who would receive the dog, and he ordered that the parties have a "full hearing"[9] to enable the court to hear evidence about "what is the best for all concerned." *Travis v. Murray*, 42 Misc.2d 447, 460, 977 N.Y.S.2d 621, 631 (Sup. Ct. New York County 2013). With respect to the evidence to be submitted, he specified,

> In accordance with that standard, each side will have the opportunity to prove not only why she will benefit from having Joey in her life but why Joey has a better chance of living, prospering, loving and being loved in the care of one spouse as opposed to the other. To this end, the parties may need to address questions like: Who bore the major responsibility for meeting Joey's needs (i.e., feeding, walking, grooming and taking him to the veterinarian) when the parties lived together? Who spent more time with Joey on a regular basis? Why did plaintiff leave Joey with defendant, as defendant alleges, at the time the couple separated? And perhaps most importantly, why has defendant chosen to have Joey live with

[9] Justice Cooper stated, "If judicial resources can be devoted to such matters as which party gets to use the Escalade as opposed to the Ferrari, or who gets to stay in the Hamptons house instead of the Aspen chalet, there is certainly room to give real consideration to a case involving a treasured pet." Nevertheless, he limited the time and judicial resources to be set aside for the hearing and advised that "full does not mean extended; the hearing shall not exceed one day." He also limited the resources that would be required to implement his decision, stating, "the award of possession [following the one day hearing] will be unqualified. This means that whichever spouse is awarded Joey will have sole possession of him to the complete exclusion of the other. Although regrettably a harsh and seemingly unfeeling outcome, it is the only one that makes sense. As has been stated, our judicial system cannot extend to dog owners the same time and resources that parents are entitled to in child custody proceedings. The extension of an award of possession of a dog to include visitation or joint custody—components of child custody designed to keep both parents firmly involved in the child's life—would only serve as an invitation for endless post-divorce litigation, keeping the parties needlessly tied to one another and to the court." *Travis v. Murray*, 42 Misc.2d 447, 460, 977 N.Y.S.2d 621, 631 (Sup. Ct. New York County 2013).

her mother in Maine, rather than with her, or with plaintiff for that matter, in New York?

Id.

Justice Cooper concluded his decision with the observation that "the types of disputes seen here will only increase in frequency," and given the "limited ability of courts to resolve such cases," (quoting *Raymond v. Lachman*), and the "hope that the analysis engaged in here, including the survey of cases from both New York and other states, will help other courts more successfully deal with the conflict that ensues when a couple separates, a marriage ends, and a Joey, an Otis, a Bubkus, or a Lovey is left in the wake." *Id*. at 461, 632.(Emphasis added.)

Unfortunately, fairly shortly after his decision, it became clear that his goal of "help[ing] other courts [to] more successfully deal with the conflict that ensures when . . . a marriage ends [leaving a family pet] in its wake" was too lofty. In 2015 two New York County Supreme Court justices (the same county where Justice Cooper sits) flatly rejected it and refused to follow it, one in a published decision, *Gellenbeck v. Whitton*, 2015 WL 6607458 (Sup. Ct. New York County, Engroron, J., 10/26/2015) and another in an unpublished decision discussed in *Gellenbeck*.

In *Gellenbeck*, the court was asked to reconsider its prior decision which had relied upon *Travis v. Murray, supra,* and had used the best for all concerned standard. The motion to reargue cited a recently decided, but unreported, decision also from New York County Supreme Court, *Szubski v. Conrad,* Index No. 151930/15 (July 13, 2015) in which the court reportedly rejected the "best for all concerned" standard based upon the difficulty in determining what is best for animals and applied property law. *Gellenbeck,Id*., 2015 WL 6607458 at 1. The *Gellenbeck* court did its own analysis of the "best for all concerned" standard and also rejected it, because it would require determining what is best for the subject animal which it found to be impossible because animals cannot speak and do not have rights of their own to even be heard by a court. *Id.*, at 1. Thus, the court held, "Stevie [the subject dog] . . . does not have the right to have a court of law predicate a decision, in whole or even in part, on what is best for her. Accordingly, this court simply erred in declaring that a 'best of all concerned' standard would and should be applied . . . The correct law is the law of property, and this Court will determine and award possession of Stevie according to that law." *Id.*, at 2.

CONCLUSION

As can be seen from the discussion above, although there has been a judicially created best for all concerned standard which some have applied, other courts have pointedly refused to do so. Thus, the Legislature should create the necessary uniform, statutory standard to assist courts in deciding which party in a matrimonial action should be granted custody of the family pet. This bill, S.4248/A.5775, passed by the legislature and modified to incorporate a "best for all concerned" standard, enacts a reasonable and consistent standard which acknowledges the unique nature of animals as living "property" that courts should use when this issue arises. This standard will help to save judicial resources and also will provide litigants with a known, predictable standard that will take into account their pets' status as living beings, which can "love and be[ ] loved," *Raymond v. Lachman*, 264 A.D.2d at 340, 695 N.Y.S.2d at 308-09. Family animal members animals, deserve no less.

NYSBA Committee on Animals and the Law, Legislation Subcommittee Report: summary of twenty-one bills from the 2021 NY Legislative Session

I. Bills passed by both houses of the Legislature and signed into law

S.4866 (Gianaris) / A.3930 (Englebright) – Signed into Law 8/2/21, Chapter 352 of the Laws of 2021, effective immediately upon signature. This law amends Subdivision 13 of section 71-0925 of the Environmental Conservation Law ("ECL") to double the monetary civil penalties associated with violations of subdivision 2 and 3 of ECL section 11-0535 which prohibit taking, transportation, possession or sale of endangered or threatened species. Respectively, the subdivisions list prohibited activities associated with endangered or threatened species, and species of special concern in New York. Monetary fines are also doubled for violations of ECL section 11-0536 governing prohibitions on the intra-state sale of specific non-native endangered or threatened species and those species' subparts. Additionally, the law directs the Commissioner of the Department of Conservation to inform the public of the need to protect endangered and threatened species and of the laws and penalties associated with providing such species' protections. *See* N.Y. Legis. Assemb. A-3930/Senate S-4866, §1, Reg. Sess. 2021-2022 (2021). Protecting species from the risk of extinction which is exacerbated by illegal wildlife trafficking requires a dual approach directed at reducing the public's demand for the illicit items and establishing disincentives that outweigh the benefits of engaging in the illegal activity. The COAL supported the passage of this legislation because the amendments reflect the importance of a multi-pronged strategy that increases penalties for violations of species protection laws, while raising public awareness about the laws and the need for species conservation.

S.6713 (Hinchey) / A.7122 (Lupardo) – Signed into Law 7/1/21, Chapter 204 of the Laws of 2021, effective upon signature. This legislation adds a new section 411 to Article 26-B of the Agriculture and Markets Law, which establishes the framework for animal welfare organizations to contract with the state and local animal response teams implementing disaster preparedness plans to and providing assistance to animals affected by an emergency or disaster in the State. The existing language in Article 26-B addresses the authority of the Commissioner of Agriculture and Markets (the "Commissioner") to form state and county animal response teams to assist animals in a declared emergency or disaster, and to recruit and train volunteers for those teams. This bill supplements Article 26-B by authorizing the Commissioner to enter into agreements with animal welfare organizations to provide care for animals during emergencies and disasters. *See* N.Y. Legis. Assemb. A-7122/Senate S-6713, §1, Reg. Sess. 2021-2022 (2021). The NYSBA Committee on Animals and the Law supports this bill because it allows the Department of Agriculture and Markets to recruit and enter into agreements with animal welfare organizations that have expertise in working with animals and resources to provide for the rescue, care and sheltering of animals, which is a step further towards forestalling widespread loss and death of animals during an emergency or disaster. *Id*.

II. Bills passed by both houses but not yet delivered to the governor

S.1442-B (Addabbo) / A.4154-B (Pretlow)- Passed by both houses but not yet delivered to the governor. The Committee on Animals and the Law has been supporting various iterations of this legislation since 2017. The current bill brings several significant changes to three statutes with the hope of eradicating inhumane slaughter of retired racehorses and breeding stock. The bill amends the Agriculture and Markets Law ("AML"), the Racing, Pari-Mutuel Wagering and Breeding Law ("PML") and the Tax Law, resulting in the following changes: (i) Requiring that all horses racing in New York, or breeding in New York, be microchipped; (ii) Establishing a more expansive prohibition of the slaughter of race horses for human or animal consumption, including the prohibition to sell, transfer, transport or deliver a horse for slaughter; (iii) Promoting accredited horse retirement and rescue programs in New York State, and (iv) Establishing dedicated accounts for both thoroughbred and standardbred horse aftercare programs funded by the bill's civil penalties. *See* N.Y. Legis. Assemb. A-4154-B/Senate S-1442-B, §§ 1-9 Reg. Sess. 2021-2022 (2021). Perhaps the single most significant aspect of this bill is that, in addition to imposing civil penalties for its violation, it mandates that violators will face immediate and permanent revocation of any New York State gaming commission licenses and become permanently ineligible to receive any awards authorized by PML sections 254 and 334. *Id.*, §1. This bill is a very significant big step forward in protecting racehorses in the state of New York. Moreover, its protections will also benefit the thriving equine industries that are so important to the state's economy.

Although the United States prohibited slaughtering horses within its borders years ago, tens of thousands of horses still are trucked to Canada and Mexico for slaughter each year, which is extremely stressful and disorienting for the horses and should be opposed on ethical and humane grounds. The ban on transport or delivery of racehorses will address this. The microchipping requirement will enable tracking of horses that are no longer racing and enforcing this bill's prohibition much more efficient. Creating accounts funded by the fines and penalties collected from violators of the bill's provisions in order to improve racehorse aftercare is yet another reason why this bill presents a holistic and well thought out plan for helping all retired racehorses. For all these reasons, the Committee on Animals and the Law supported this bill.

S.4248 (Skoufis) / A. 5775 (Glick) – "Best Interest of the Companion Animal" bill - Passed by both houses of the legislature but not yet delivered to the Governor.
This bill would amend section 236(B)(5)(d) of the Domestic Relations Law by adding a new subparagraph stating that a court shall consider the "best interest of a companion animal"[1] when asked to award permanent possession of such animal during divorce or separation proceedings. Although the Committee supported this bill, it did so while also suggesting that instead of using the language "best interest of the animal" the legislature should adopt language that follows case law which has developed in this area, i.e., to consider the "best for of all concerned." We took this position because we recognized that the bill's "best interest of the animal" language (which tracks with the best interest of the child standard in child custody cases and is necessarily a subjective test) is not workable when the subject of a custody dispute is an animal. Since 1999,

[1]"Companion animal" has the meaning set forth in §350(5) of the Agriculture and Markets Law.

in *Raymond v. Lachman*, 264 A.D.2d 340, 695 N.Y.S.2d 308, 309 (1st Dept. 1999), courts have rejected that approach, which would require courts to make that subjective determination of an animal's interests,and some have instead fashioned a more appropriate "best interest of all concerned" or "best for all concerned" test, which takes into account the interests of all of the parties, including the animal. For instance, the *Raymond* court held, "we think it best for all concerned that, given his limited life expectancy, Lovey, who is now almost ten years old, remain where he has lived, prospered, loved and been loved for the past four years." *Id.* Almost twenty years later in *Feger v. Warwick Animal Shelter*, 59 A.D. 3d 68, 870 N.Y.S.2d 124 (2d Dept. 2008), the court specifically approved the best for all concerned standard announced in *Raymond,* and in then in 2013, a thoughtful and oft-cited decision of New York County Supreme Court Justice Matthew F. Cooper also used the "best for all concerned" standard. Justice Cooper, in *Travis v. Murray*, 42 Misc. 3d 447, 977 N.Y.S.2d 621 (N.Y. County 2013), specifically rejected the subjective best interest of the animal test and instead required both parties to show that the companion animal would have a "better chance of living, prospering, loving and being loved in the care of one spouse as opposed to the other." *Id*., at 459. Recently a in Chatuatauqua County City Court judge rejected both a best interests of the animal test and a strict property analysis (finding that it was neither desirable nor appropriate), and instead, observed that other New York courts had previously settled on the best for all concerned standard which "analyzed each party's evidence of their benefit from having the animal in their life and why the animal has a better chance of living, prospering, loving and being loved in their care." *Finn v. Anderson,* 64 Misc. 3d 273, 276-77, 101 N.Y.S.2d 825, 827-28(City Court, Chatuatauqua County 2019).While a bill preventing courts from strictly applying property law when determining custody of companion animals is an excellent idea, the best form of such a bill would follow the already-existing case law holding that courts should examine the best interest of all concerned, not the best interest of the animal.

S.4254 (Gianaris) / A.4075 (Glick) –This bill was passed by both house of the Legislature but not yet delivered to the Governor and it shall become effective the ninetieth day after being signed into law. The NYSBA Committee on Animals and the Law has been supporting various iterations of this legislation for more than five years. This bill adds a new section to the Insurance Law which prohibits homeowners' insurers from refusing to issue, from cancelling or charging an increased premium to homeowners based **solely** upon the presence of a dog of a particular breed in the premises to be insured. The Committee on Animals and the Law finds bills of this nature to be very important because they will bring the reality of dog ownership into conformity with as New York State's law making breed discrimination by a public/municipal entity illegal.[2] The prohibition against municipalities declaring that people may not have dogs of a particular breed becomes largely meaningless when homeowners' insurers may effectively preclude dogs of specific breeds from residing with people by making insurance virtually

[2] Article 7, § 107(5) of the Agriculture and Markets Law states, "Nothing contained in this article shall prevent a municipality from adopting its own program for the control of dangerous dogs; provided, however, that no such program shall be less stringent than his article and no such program shall regulate such dogs in a manner that is specific to a breed."

impossible to obtain or retain or by making it prohibitively expensive to do so. Thus, families are faced with the awful choice of keeping their canine family member or their homeowners' insurance. While the intent of this bill is to keep dogs in their families' homes, this is balanced with the commercial interest of insurance companies. The bill does not require insurance companies to insure every single risk presented to them when a dog is present. Instead, it specifically reserves to them the ability to analyze each risk based upon the particular history of the particular resident dog, actually requiring that insurance companies analyze each prospective insured based upon the information pertaining only to that particular household and its canine members. Insurers may consider a dog's history of having been determined to be a "dangerous dog" pursuant to section 123 of the Agriculture and Markets law. Generalized determinations based upon breeds will not be allowed. By bringing the everyday reality of residing with dogs into alliance with New York's prohibition against breed discrimination, this bill does much to help families (human and canine) avoid being negatively impacted by the very breed discrimination that public entities may not practice.

S.5023-A (Gianaris) / A.5823-A (L. Rosenthal)– This bill was passed by both houses of the Legislature but has not yet been delivered to the governor. If enacted into law, it will become effective 120 day thereafter. This bill amends section 6714 of the Education Law to require veterinarians to report suspected animal cruelty and to disclose records concerning the companion animal's condition and treatment to any officer or agent authorized pursuant to §§ 371 and 373 of the Agriculture and Markets Law to respond to and investigate complaints of animal cruelty. The current version of section 6714 of the Education Law permits, but does not mandate, veterinarians to report cases of suspected cruelty when a veterinarian reasonably and in good faith suspects that a companion animal's injury, illness or condition was the result of animal cruelty. Under the current version of the law, those reports may be made to the police, duly incorporated society for the prevention of cruelty to animals, peace officer, district attorney's office, animal control officer, department of agriculture and markets, or other appropriate government. The bill also provides that the identity of the veterinarian making a report shall not be disclosed, except to an authorized agent or officer authorized pursuant to §§ 371 and 373 of the Agriculture and Markets law to respond to and investigate complaints of animal cruelty. This bill was the subject of extensive discussion by the Legislation Subcommittee of the Committee on Animals and the Law, but no consensus of opinions could be reached. The Legislation Subcommittee therefore did not make any recommendation to the full Committee on Animals and the Law for a position to take on the bill. Subcommittee members raised concerns about the bill in its current form included the fact that it substantially limited the people to whom reports of suspected abuse could be made, the fear that people would not seek medical care for their companion animal for fear of being reported to the authorities, and the concern that the identity of the veterinarian making a report would be known, even though it was not formally disclosed.

III. Bills not passed by both houses of the Legislature

S.90 (Kaminsky) / A.696 (Zebrowski) – Passed Senate 3/8/21; in Assembly Agriculture Committee. The law would take effect on the ninetieth day after it was enacted. See N.Y. Legis. Assemb. A-696/Senate S-90, §1 Reg. Sess. 2021-2022 (2021).This bill significantly revises portions of the Agriculture and Markets Law related to the crimes of animal fighting and promoting animal fighting, and it conforms the associated penalties to New York's penal code. Two notable changes include the establishment of multi-layered offenses related to the facilitation of animal fighting, including the possession of bait animals, and the addition of § 351-c, "Promoting Enterprise Animal Fighting," a class C-felony. Under the bill, levels of enterprise animal fighting include ongoing animal fighting exhibitions and activities involving multiple animals.

Along with being an extreme form of animal cruelty, animal fighting has connections to other crimes such as illegal gambling and possession of drugs and firearms, as well as ties to organized crime. Ease of promotion via the internet and weak law enforcement have resulted in a surge in underground animal fighting in New York and elsewhere, despite various federal and New York State laws illegalizing animal fighting. Activities that support animal fighting, such as spectating and harboring bait animals to train fighting dogs, directly and indirectly foster animal fighting events. By increasing the penalties for all animal fighting related activities and defining the enterprise related offenses which establish grounds to invoke the federal Racketeer Influenced and Corrupt Organizations Act (RICO), this legislation addresses many of the weaknesses undermining the current law. For the reasons stated, the Committee on Animals and the Law first supported this legislation in 2020 and supported it again in 2021.

S.418 (Hoylman) and A.1518 (L. Rosenthal) – These bills are not "same as" bills. S.418 is in Senate Environmental Conservation Committee; A.1518 is in Assembly Environmental Conservation Committee. This legislation would become effective immediately upon being signed into law and amends the Environmental Conservation Law to add giraffes, and all species of rhinoceros, to provisions prohibiting the sale, trade barter or intent to sell, trade or barter of included species and their subparts, and increases the penalties associated with any violations. Apart from a Section 4 discrepancy regarding when any additions, amendments and/or repeals of any rule or regulation necessary for the implementation of this act must be completed, the bills are identical. *See* N.Y. Legis. Assemb. A-1518, §1 Reg. Sess. 2021-2022 (2021); *See also* Senate S-1484, §1 Reg. Sess. 2021-2022 (2021).

Despite being recognized by international treaties and scientific authorities as a species at risk of extinction, giraffes are not protected under federal law, and New York remains a leading source of commercial activity for giraffe parts and trophies. Rhinoceros are also critically threatened in the wild, and commercial trade in rhinoceros and their subparts is subject to various federal and international restrictions, but only two subspecies are provided statutory protections under current New York law. By adding giraffes into the statutory protections and including all rhinoceros, this bill takes critical steps forward to preserving these two iconic species in the wild. The Committee on Animals the Law supported this legislation but urged the sponsors to work

together to conform the implementing language of the two bills in Section 4, noting that an earlier draft of the bill had identical provisions.

S.960 (Krueger) / A.2152 (L. Rosenthal) - Passed Senate 5/5/21; in Assembly Agriculture Committee. This bill shall take effect immediately upon becoming law. The Committee on Animals and the Law has been supporting various iterations of this legislation since 2015. The current bill amends the elements of the crime of aggravated cruelty to animals under section 353-a (1) of the Agriculture and Markets Law by eliminating the requirement that the injury to the animal be "serious." Currently §353-a states, "A person is guilty of aggravated cruelty to animals when, with no justifiable purpose, he or she intentionally kills or intentionally causes serious physical injury to a companion animal with aggravated cruelty." Prosecutors have found that some courts have refused to find defendants guilty or have reduced charges from the felony aggravated cruelty to misdemeanor cruelty to animals because by the time the case involving the animal has come before a judge, the animal has recovered from its serious injuries, although other elements of the aggravated cruelty statute have been met. Animals, as living beings, are unique forms of evidence because their condition changes as they heal. This bill makes it clear that all unjustified physical harm intentionally caused to animals is sufficient to be considered as aggravated cruelty, and the seriousness of the animal's injuries should not be taken into account. Because the capacity of an animal to recover from a vicious and attack should not be an indicator of the gravity of the perpetrator's conduct. For these reasons, the Committee on Animals and the Law supported this bill.

S.1148 (Kaminsky) / A.6107 (Zebrowski) – This bill did not pass in either house of the Legislature and is in the Agriculture Committee in each of the houses. This bill would take effect immediately upon enactment. This bill directs the Commissioner of the Department to establish licensing and educational standards for individuals providing training services for companion dogs. Trainers of other dogs, such as service and police dogs as defined in § 108 Agriculture and Markets Law are excluded from the provisions. Anyone convicted of violating New York's animal cruelty laws would be prohibited from obtaining a license. *See* N.Y. Legis. Assemb. A-6107/Senate S-1148, §1 Reg. Sess. 2021-2022 (2021).

Current New York Law lacks provisions regulating or addressing, in any way, the credentials, knowledge or experience of individuals advertising themselves as canine trainers. Consequently, companion dog owners seeking dog-training assistance may expose their pet to harmful and inhumane practices that do not reflect newer, humane industry standards and may incite or exacerbate problem behaviors. The Committee on Animals and the Law first supported this legislation in 2018. Since then, it has continued to offer suggestions to ensure that the bill meets its intended goals. Firstly, the bill should include the dog training licensing requirements modeled after the Certification Council for Professional Dog Trainers (CCPDT) guidelines and its Certified Professional Dog Trainers-Knowledge Assessed (CPDT-KA) exam. Secondly, rather than establish a new licensing scheme under the Agriculture and Markets Law, the bill should take advantage of the current licensing processes used for over 35 other business professions under the General Business Law. Doing so would grant the Secretary of State the authority to oversee dog training licenses, inspect dog training facilities and impose civil

penalties for licensing violations. Lastly, specific cruel and detrimental practices used by some dog trainers should be explicitly prohibited including, but not limited to, alpha rolling or using any equipment, devices or implements in a manner inconsistent with humane practices or outside of the manufacturer's recommendations.

S.1484 (Serrano) / A.3283 (L. Rosenthal) – This bill did not pass in either house of the Legislature and is the Environmental Conservation Committee in both houses. This bill will be effective immediately upon enactment. This bill modifies the annual which report nuisance wildlife control operators (NWCO) must submit to the Department of Environmental Conservation to include in the reports the occasions and reasons when lethal, rather than non-lethal methods, were used methods. The bill also requires that the Department's list of NWCOs include enforcement actions related to violations of nuisance wildlife control laws and regulations and that it be made available to the public. *See* N.Y. Legis. Assemb. A-3283/Senate S-1484, §1 Reg. Sess. 2021-2022 (2021). Under current New York law, NWCO are trained in humane methods of capturing, relocating, and deterring nuisance wildlife, but the use of non-lethal methods is not required or documented. The Committee on Animals and the Law supported this legislation, hopeful that the increased transparency provided by the bill's reporting requirements will allow the public to make inform choices among NWCOs and to select those who have been demonstrated to be committed to using humane, non-lethal methods for managing nuisance wildlife whenever possible.

S.2176 (Sepulveda) /A. 456 L. Rosenthal)– This bill did not pass in either house of the Legislature and is in the Agriculture Committee in both house. This bill is to become effective 90 days after it is signed into law. It adds wildlife (as defined in § 11-0103 of the Environmental Conservation Law) as animals protected under New York's aggravated cruelty statute (§353-a of Agriculture and Markets Law), the violation of which constitutes a felony. Presently the same exact conduct which would fall within the purview of the aggravated cruelty statute if perpetrated upon a companion animal, would fall under the state's general anti-cruelty statute (§353 of the Agriculture and Markets Law) as a misdemeanor if committed against wildlife.

Aggravated cruelty to animals is defined as conduct which "with no justifiable purpose, he or she intentionally kills or intentionally causes serious physical injury to a companion animal with aggravated cruelty. For purposes of this section, 'aggravated cruelty' shall mean conduct which: (i) Is intended to cause extreme physical pain; or (ii) Is done or carried out in an especially depraved or sadistic manner." (Emphasis added.)This bill extends the protection afforded to companion animals to include wildlife. The Committee on Animals and the Law has consistently supported a version of this bill since 2015 because it is logically inconsistent to afford a pet rabbit, rat, frog, etc. protections under the state's anti-cruelty laws different from those afforded to those exact same animals who happen not to be living as pets. Moreover, excluding wildlife from the definition of aggravated animal cruelty, places less value upon the degree of pain and suffering that non-companion animals experience from intentionally tortuous, depraved or sadistic conduct simply because they do not live as companion animals; this distinction is non-sensical. Finally, penal laws generally focus upon the conduct being

proscribed, rather than upon the nature of the victim. Logic dictates that heinous acts of cruelty against animals be treated the same under the law, regardless of whether the animal victim falls within the statutory definition of a companion animal.

S.2783 (Sepulveda) / A.715 (L. Rosenthal)–This bill passed the assembly on 5/20/21 and is in the Health Committee in the Senate. It is to become effective one year after it becomes law. This bill specifically authorizes emergency medical care personnel to provide basic first aid to dogs and cats found on the scene of an emergency situation. Although we all have seen news clips of first responders tending to animals, New York's law presently does not address this. This bill identifies emergency first responders authorized to act under it and allows them to provide treatment to a dog or cat if no persons require medical attention at the time, and if they are trained to provide the treatment they intend to provide to the dog or cat to a human. *See* N.Y. Legis. Assemb. A-715/Senate S-2783, §2 Reg. Sess. 2021-2022 (2021). The proposed law strikes a careful balance between the need to provide life-saving medical care to dogs and cats in an emergency, and the need to ensure that medical professionals trained to treat humans remain able to do so. For these reasons, the Committee on Animals and the Law supported this bill.

S.3525-A (Bailey) / A.5315-A (L. Rosenthal) –This bill did not pass in either house of the Legislature and is in the Judiciary Committee in both houses and is to take effect one hundred eightieth day after becoming law. The Committee on Animals and the Law supported this bill this year and also supported last year's version of this bill. As amended during this Legislative session, the bill provides that in any civil or criminal proceeding regarding the welfare of an animal, a court may, on its own initiative or at the request of any party, appoint a special (volunteer) advocate[3] to represent the interests of such animal and to help ensure the well-being of any living animal victim. *See* N.Y. Legis. Assemb. A-5315-A/Senate S-3525-A, §1 Reg. Sess. 2021-2022 (2021). Such advocate may consult records relating to the animal's condition and the conduct of the defendant (if relevant) as needed in order to provide a victim impact statement to the court. The advocate will also present to the court information and recommendations relating to the interest of the animal which derive only from information obtained during the course of the advocate performing his or her duties. Creating this position could give a voice to animal victims, who are unable to advocate for themselves and will also enable judges to base their decisions upon a more thorough understanding of the circumstances surrounding action, with an emphasis on the animal victim.

S.3835 (Addabbo) / A.1903 (L. Rosenthal) –This bill did not pass in either house of the Legislature and is in the Agriculture Committee in both houses. The Committee on Animals and

[3] The bill states that the Department of Agriculture and Markets shall maintain a list of attorneys and law students knowledgeable in the animal related issues and the legal system who are eligible to serve as volunteer advocates. The Committee on Animals and the Law suggested the list of potential appointees be maintained by the Office of Court Administration which already has a system in place for appointments in court proceedings (see 22 NYCRR Part 36) which could apply to the appointments authorized by this bill.

the Law has been supporting various iterations of this legislation since 2015. The proposed legislation requires every licensed pet dealer that houses animals on their premises to have and maintain a fire protection system, including an automatic sprinkler system connected to municipal water supply, that meets the standards set forth in the legislation. The scope of the bill is restricted to buildings that are not zoned as residential, and such system is to be in place within one year of the bill's effective date. *See* N.Y. Legis. Assemb. A-1903/Senate S-3835, §1 Reg. Sess. 2021-2022 (2021). An effective fire protection system is of the utmost importance for the safety of animals in pet stores, as they are typically caged within and locked into commercial establishments that are not under constant supervision. The animals are also exposed to a greater risk of fire breaking out due to the equipment often required for their care, such as heat lamps. The Committee on Animals and the Law supported this bill, but it also suggested the following modifications: 1) Eliminate the exemption for pet dealers operating in a residentially zoned property; 2) Consider exempting buildings located in municipalities in which automatic sprinkler systems cannot be connected to the municipal water supply from that particular requirement (only) of the bill; and 3) Extend the time period allocated for pet dealers to comply with the bill once signed from one year to three years because retrofitting buildings will impose construction burdens upon the owners of existing buildings.

S. 4081-A (Hinchey) / A. 1769 (Lupardo) – This bill was not passed by either house of the Legislature and remains in the Agriculture Committee in each. This bill, which would take effect immediately upon its signing, was first introduced in the 2021 Legislative session. It adds a new section to the Agriculture and Markets law that would require an owner, lessor or designee of property that has become vacant as a result of an eviction, foreclosure, forfeiture or default on a mortgage, trust deed or land sales contract or abandonment to inspect such property within three days of such vacancy (under the Assembly version of the bill) or within three days of when such person knew or should have known of such vacancy (under the amended version of the Senate bill)[4] to ascertain if any animals were left behind in the premises. The bill mandates that if, upon such inspection, the owner, lessor or designee discovers an animal that appears to have been abandoned, that person must notify a dog control officer, a police officer or an agent of a duly incorporated society for the prevention of cruelty to animals, and it provides that the person who discovers the animal will not be deemed to be owner of such animal(s). Failure to comply with the bill's requirements will subject the violator to fines of $500 to $1,000, depending on how many times the violation has occurred, and all fines collected are to be deposited in the State's population control fund. The bill also specifies that it is not to be construed as limiting or impacting any agency's enforcement of any other laws pertaining to abandoning or cruelty to animals. The Committee on Animals and the Law supported this bill as it imposes a non-onerous mandate upon the person responsible for the vacated property to promote the goal of saving the

[4] This bill was amended in the Senate after the Committee on Animals and the Law submitted its Memorandum in Support of it. The Senate Amendments were minor but created a situation where the bills are no longer identical. Thus, if we decide to support this bill in the 2022 Legislative Session, we would suggest to the Assembly that it amend its language to comport with that of the Senate.

lives of animals that otherwise may not be discovered for extended lengths of time and suffer from hunger and/or dehydration causing pain, serious injury or even death.

S.4459 (Addabbo) / A.3467 (L. Rosenthal) –This bill did not pass in either house of the Legislature and is in the Environmental Conservation Committee in both houses and will take effect the thirtieth day after is it signed into law. This bill amends sections 11-1101, 11-1903 and 11-1901 of the Environmental Conservation Law to prohibit the use of wildlife leg-gripping traps, which are used to trap furbearing animals such as beavers, raccoons, foxes and coyotes. These traps are triggered by springs once an animal steps into them, clamping onto the animal's limb and holding the animal in place until it is discovered by the trapper. Leg-gripping traps inflict tremendous pain on animals and also present significant risks of catching non-target species, including humans and family pets, as they cannot discriminate between their victims. More humane alternatives exist and are readily available, including box or cage traps. For these reasons, the Committee on Animals and the Law supported the passage and enactment of this bill.

S. 4839-A (Biaggi) / A. 5653-A (L. Rosenthal)–This bill, entitled, "Selling of Animal Tested Cosmetics," did not pass in either house of the Legislature and was in the Consumer Protection Committee in the Senate and in the Economic Development Committee in the Assembly. It was to have taken effect on January 1, 2022. This bill amends the General Business Law by adding a new section which will prohibit the manufacture, knowing import, sale or offer for sale of the any cosmetic product or any component of it which was developed or manufactured using cosmetic animal testing. This bill defines "cosmetic" very broadly to include any item applied to the human body for cleansing or beautifying. It also defines "cosmetic animal testing" as "the internal or external application of a cosmetic, either in its final form or any ingredient thereof, to the skin, eyes, or other body part of a live non-human vertebrate."Perhaps most importantly, it provides the Attorney General with enforcement powers and provides for civil monetary penalties for its violation ranging from $500 to $5,000 for a first violation, and $1,000 for each additional day of continued violation. This bill which was first introduced this year, was supported by the Committee on Animals and the Law supported as an important step towards eliminating the needless torture of animals, especially for produce non-essential products.

S.4840-B (Biaggi)/A.5542 (Englebright) – This bill did not pass in either house of the Legislature and is in Senate Environmental Conservation Committee and was on Assembly calendar but not brought to a vote. The law would take effect immediately upon enactment. *See* N.Y. Legis. Assemb. A-5542, §1 Reg. Sess. 2021-2022 (2021). This bill prohibits the use of non-human primates, lions, tigers, bears, lemurs, wolves, alligators and other animals within the same orders and families under ECL § 11- 0103(6)(e) from being used in circuses or traveling animal acts. Exceptions are made for facilities accredited by the Association of Zoos and Aquariums, and wildlife sanctuaries as defined under NY Environmental Conservation Law § 11-0103, and neither farm and nor companion animals are covered by it. As sentient beings, wild animals such as the species covered under this bill experience ongoing extreme physical and psychological suffering from the unnatural demands of performance life, whether in a circus or

as part of a traveling animal act. Although circuses are not defined within the bill, they are included in the list of entertainment acts prohibited from using elephants for similar reasons under the 2017 Elephant Entertainment Act, found at § 380 of the Agriculture and Markets Law. The Committee on Animals and the Law offered qualified support for a version of this legislation in 2020, because that bill did not extend its protections for the referenced wildlife beyond circuses to include traveling animal acts. The version of the bill introduced in 2021 explicitly defines the terms "traveling animal acts" and "performance" to prohibit activities that are for entertainment only. For these reasons, the Committee on Animals the Law offered unqualified support for the enactment of this bill.

S. 5058 (Reichlin-Melnick) / A. 5728 (Glick) – This bill was not passed in either house of the Legislature and was sent to the Environmental Conservation Committee in both houses. The Committee for Animals and the Law supported this legislation for the first time this year because it offers another opportunity to diminish the amount of lead in our environment.[5] Following the food chains among carnivores and raptors, the impact of lead extends well beyond the animal or bird actually shot with the lead ammunition. In fact, much of the harm that lead ammunition causes is not direct, but instead is the aftereffects of the initial lead shot or bullet discharge, in particular the latent impact upon other animals or to the groundwater and earth,[6]because it degrades slowly and leaches into the water and land.[7] Documented levels of lead have even been found in soil and earthworms.[8] Recognizing this, the federal government[9], the State of California[10]and Canada[11]all have illegalized hunting with lead shot, some on private and some on public lands. The ban contained in this bill is limited in scope, applying only to public lands and land area that contributes surface water to the water supply of New York City; it is NOT an all out ban on hunting in these areas but only requires the use of alternatives to lead ammunition. New York has imposed mandates in order to reduce lead exposure and promote the health of its citizens in general, such as requiring lead paint disclosures in all residential home sales, for years and the Committee on Animals and the Law supported this bill which will also promote the public good.

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[5]The detrimental health effects caused by lead, especially upon children, has been well documented for years, with the World Health Organization proclaiming that *no* level of lead exposure is safe. See, https://www.who.int/en/news-room/fact-sheets/detail/lead-poisoning-and-health last visited on 9/11/2021.

[6] Indirect lead exposure occurs when an animal that has ingested or been shot with lead is eaten by another animal, and in this way it impacts meat eating mammals and birds. Indirect exposure can also occur from any animal ingesting soil, water, or lower organisms, such as earthworms, that are contaminated with lead.
Kolb, Sarah, "Lead Toxicity, a Threat to Wildlife." Found at https://todaysveterinarynurse.com/articles/management-strategies-lead-toxicity-a-threat-to-wildlife/ . Last visited 4/27/2021.

[7] Kolb, Sarah, "Lead Toxicity, a Threat to Wildlife." *supra,* fn. #2.

[8] Environ Sci Pollut Res Int 2014 Mar;21(5):3484-90,doi: 10.1007/s11356-013-2344-z. Epub 2013 Nov 19. "Lead accumulations and toxic effects in earthworms (Eisenia fetida) in the presence of decabromodiphenyl ether" also found at https://pubmed.ncbi.nlm.nih.gov/24243266/ last visited 4/24/2021.

[9]50 C.F.R §20.21 and 50 C.F.R. §32.2.

[10] See, https://news.bloomberglaw.com/environment-and-energy/california-becomes-first-state-to-ban-lead-bullets-for-hunting Last visited on 4/26/2021.

[11] See, https://www.fws.gov/news/ShowNews.cfm?ID=A11C3D76-AC20-11D4-A179009027B6B5D3 last visited on 4/26/2121.

S. 5156 (Brooks) / A. 1549 (L. Rosenthal) – This bill did not pass in either house of the Legislature and is in the Codes Committee in the Senate and in the Agriculture Committee in the Assembly. It will take effect twelve months after being signed into law. This bill adds a section to the Executive Law requiring the establishment and maintenance of an Animal Cruelty Crime Database, and was first introduced this year. However, for many years, the Committee on Animals and the Law has supported various bills creating a State wide registry for people convicted of animal cruelty crimes which would to provide a full and uniform source of information throughout the State to supplant the various, currently existing local municipalities' registries. Although the Committee on Animals and the Law would prefer that a statewide registry be created, it supported this bill as a first step in making information about animal abusers available throughout the state in order to protect animals from further abuse by these individuals. In addition to supporting this bill, the Memorandum in Support urged the bill's sponsors to consider adding provisions to it or sponsoring additional legislation that would provide for the use of the database information to prohibit listed individuals from owning a companion animal or living in a household where a companion animal is present, or from working or volunteering in any facility where animals are regularly present, such as animal shelters, humane societies, SPCAs, animal rescues, zoos, animal exhibitors, veterinary facilities, stables, pet dealers, and animal grooming and boarding facilities. The Memorandum in Support also noted that implementation of such a provision would require that the information in the Animal Cruelty Database be made available to zoos, animal exhibitors, veterinary facilities, stables, pet dealers, and animal grooming and boarding facilities.

Animals as Copyright Holders: Discovering Rights for the Artistic Animal

Andrew Kim
Sandra Day O'Connor College of Law
J.D. Candidate, 2022

Animals as Copyright Holders:
Discovering Rights for the Artistic Animal

I. Introduction

In December of 2019, an art gallery in London hung fifty-five abstract expressionist paintings on its walls, each with a price ranging from $1850 USD to $7500 USD, the whole collection priced at $247,000 USD.[1] Works that are valued at such prices naturally make us curious to know more about the artist and the story behind the artwork, but in this case, we may never know the full story, as the artist who painted them was not of our kind. *Congo the Chimpanzee: The Birth of Art* showed at the Mayor Gallery in London and featured the works of a Chimpanzee named Congo that zoologist Desmond Morris had acquired during his years of primate observation and study.[2] The show at the Mayor Gallery was not Congo's first walk in the world of high-art. In 1957, Morris displayed Congo's, along with other primates', paintings at the Institute of Contemporary Arts (ICA) in the *Paintings by Chimpanzees* show.[3] Art giants such as Pablo Picasso, Salvador Dali, and Joan Miró expressed great interest and support for the works.[4]

Desmond Morris let the critics decide whether Congo's paintings merited thousand-dollar price tags or deserved praise in the art collecting world. However, Morris did not let others decide who owned the paintings and their profits.[5] The relationship between Congo's creative

1 Rory Sullivan, *Collection of paintings by famed chimp artist go on sale for $250,000*, CNN STYLE (Oct. 9, 2019), https://edition.cnn.com/style/article/chimp-paintings-on-sale-scli-intl/index.html.
2 MAYOR GALLERY, https://www.mayorgallery.com/exhibitions/549-congo-the-chimpanzee-the-birth-of-art/overview/ (last visited Nov. 22, 2020).
3 Melanie Coles, *The Last Living Surrealist: Desmond Morris on Paintings by Chimpanzees, His Work and the Origins of the ICA*, ICA (July 4, 2016), https://archive.ica.art/bulletin/last-living-surrealist-desmond-morris-paintings-chimpanzees-his-work-and-origins-ica.
4 *See id.*
5 Jason Daley, *Art by Congo, the Famous Painting Ape, to Go on Sale*, SMITHSONIAN MAG. (Oct. 9, 2019), https://www.smithsonianmag.com/smart-news/dozens-paintings-1950s-chimp-artist-congo-go-sale-180973305/.

output and Morris's involvement was as business-like as it was scientific. Congo would choose colors and brushes, produce a composition, and perform the creative labor. Morris would then seize control of the painting for research, publicity, or profit. On one occasion, he even exchanged one of Congo's paintings for a few of Joan Miró's.[6] In almost every respect, Desmond Morris controlled the acquisition, exclusion, and disposition of Congo's paintings.

An agent-artist relationship like this would raise concerns about fairness if the artist were a human. However, since the artist was an animal, it was accepted as a given that the human owner controlled not only the paintings and their profits, but the animal itself. The dissonance between these two standards of fairness for human and non-human life, is disturbing at first glance and raises the question: Could Congo enforce ownership over his paintings? Should we allow Congo to enforce ownership? How would intellectual property ownership benefit a chimpanzee? What benefits would we receive if we gave Congo interests in intellectual property?

This paper explores how creatively productive animals are entitled to copyrights under current statutory and common law, and how copyright enforcement can benefit not only individual animals but also entire ecosystems as well. In particular, this paper focuses on the soundness of the United States Ninth Circuit Court of Appeals' decision in *Naruto v. Slater* ("*Naruto*") in relation to *Cetacean Community v. Bush* ("*Cetacean*"). This paper concludes that, in reaching their decision in *Naruto*, the Ninth Circuit incorrectly borrowed the reasoning in *Cetacean* to exclude animal authors from protection under the Copyright Act. To the contrary, the Copyright Act already extends protection to animals under its current language. This paper asserts that, when it determined whether the Copyright Act excluded animals, the court

[6] Coles, *supra* note 3.

unknowingly injected a presumption of humanity into its interpretation of the word "author" and its surrounding linguistic context and that, absent the presumption, the Ninth Circuit court should find that animals have standing under the Copyright Act.

In part II of this paper, I detail the Ninth Circuit's reasoning in *Naruto* and how it used the holding in *Cetacean*. In part III, I outline the presumption of humanity that the court relied on in their decision. In part IV, I look at the meaning of the term "author" and "original works" under the Copyright Act and argue that discoveries in the fields of animal psychology, cognition, and ethology show how animals meet the statutory definition of "author" under the Copyright Act. In part V, I survey the systems of property that animals partake in and the current state of animal property rights before revisiting the *Naruto* decision with a new, scientifically informed perspective in part VI. In part VII, I argue that animal copyright can protect and restore the ecosystems that animal authors inhabit and address concerns about the dynamic between animal copyright and the purpose of the Copyright Act.

Untitled Abstract, tempera on paper.[7]

II. A Monkey in the Ninth Circuit

In the summer of 2011, Welsh photographer David Slater traveled to Sulawesi, Indonesia to take photos of a troupe of Black Crested Macaques.[8] After gaining the primates' trust, he set up his camera on a tripod and had the monkeys press a remote that would trigger the camera to take a photograph.[9] During these photo sessions in Sulawesi, individuals from the troupe of macaques took multiple portraits of themselves that became known as the "monkey selfies."[10] In December of 2014, Slater published the photos in a book titled "Wildlife Personalities" through San Francisco based publishing company Blurb Inc. ("Blurb").[11] In particular, the book contained a selfie that a male Black Crested Macaque named Naruto took.

A. The Litigation

On September 22, 2015, People for the Ethical Treatment of Animals ("PETA") filed suit against Slater and Blurb Inc. on behalf of Naruto as his "Next Friend" in the District Court for the Northern District of California.[12] In its complaint, PETA argued that the meaning of the term "author" in the Copyright Act was ambiguous and did not exclude animals from the definition.[13] It further argued that Naruto had an enforceable copyright because it was Naruto who pressed the camera trigger and took the photo.[14] PETA then requested that the court assign Naruto a

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7 Congo the Chimpanzee, *Untitled Abstract* (illustration), *in* BONHAMS (June 20, 2005), https://www.bonhams.com/auctions/11928/lot/29/ (last visited Nov. 8, 2020).

8 Louise Stewart, *Wikimedia Says When a Monkey Takes a Selfie, No One Owns It*, NEWSWEEK (Aug. 21 2014, 9:31 AM), https://www.newsweek.com/lawyers-dispute-wikimedias-claims-about-monkey-selfie-copyright-265961.

9 *See id.*

10 *See id.*

11 Olga R. Rodriguez, *A macaque monkey who took now-famous selfie photographs cannot be declared the copyright owner of the photos*, U.S. NEWS & WORLD REPORT (Jan. 7, 2016), https://www.usnews.com/news/offbeat/articles/2016-01-06/judge-rules-monkey-cannot-own-selfie-photos-copyright.

12 Complaint for Copyright Infringement & Demand for Jury Trial, Naruto v. Slater, 2016 U.S. Dist. LEXIS 11041 (N.D. Cal. Jan. 28, 2016) (No. 15-cv-4324).

13 *See id.* at 2.

14 *See id.*

copyright for the selfie and appoint PETA to distribute the profits from the selfie for the sole benefit of "Naruto, his family and his community..."[15] Slater and Blurb moved to dismiss the case for lack of Article III standing and for lack of statutory standing under the Copyright Act.[16]

In January, 2016, the court followed the decision in *Cetacean* that Article III of the Constitution did not "compel the conclusion that a statutorily authorized suit in the name of an animal is not a 'case or controversy,'" and so held that Naruto had standing under Article three of the United States Constitution.[17] However, the District Court granted Slater's motion to dismiss the case for lack of statutory standing under the Copyright Act.[18] In other words, although the court held that the Constitution gave Naruto the right to bring a suit, the court believed that the Copyright Act itself did not protect Naruto nor give him the right to bring suit.

Citing *Cetacean*, the District Court evoked the *Cetacean* court's rule that "if Congress and the President intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly."[19] The District Court for the Northern District of California borrowed this rule to find that the Copyright Act did not "plainly" extend protection to animals.[20] Additionally, the court pointed to the historical treatment of the Copyright Act and how courts used words like "human beings" and "person" to refer to "author" in the Copyright Act.[21] They also gave deference to the Compendium of U.S. Copyright Office Practices, a manual for Copyright Office Practices with no binding authority, that included a

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[15] *See id.* at 10.
[16] Defendant Blurb, Inc.'s Notice of Motion and Motion to Dismiss the Complaint for Copyright Infringement; Memorandum of Points and Authorities, Naruto v. Slater, 2016 U.S. Dist. LEXIS 11041 (N.D. Cal. Jan. 28, 2016) (No. 15-cv-04324-WHO); Motion to Dismiss the Complaint for Lack of Standing and Failure to State a Claim Upon Which Relief can be Granted [FED. R. Civ. P. 12(b)(1), 12(b)(6), Naruto v. Slater, 2016 U.S. Dist. LEXIS 11041 (N.D. Cal. Jan. 28, 2016) (No. 15-cv-04324-WHO).
[17] *Naruto v. Slater*, No. 15-cv-04324-WHO, 2016 U.S. Dist. LEXIS 11041 at *5 (N.D. Cal. Jan. 28, 2016).
[18] *See id.*
[19] *See id.* at 8.
[20] *See id.*
[21] *See id.* at 9.

Human Authorship Requirement for Federal Copyright Registration.[22] In reviewing the history and treatment of the term "author", the court determined that the Copyright Act did not plainly authorize animals to sue.[23]

B. The Ninth Circuit's Decision

On March 20, 2016, PETA appealed the case to the Ninth Circuit Court of Appeals. The Ninth Circuit reasoned that the Copyright Act did not extend protection to animals and affirmed the District court's holding that Naruto had no statutory standing under the act.[24] Despite an amicus brief by a primatologist and macaque expert who articulated how Naruto had met the Copyright Act's authorship requirement, the Ninth Circuit repeated much of the same reasoning as the District Court.[25] It held that the Copyright Act did not "plainly" authorize animals to sue under it because the term "author" was exclusive to humans.[26] The court additionally referenced the act's use of the terms "widow," "widower," "legitimate," "children," and "grandchildren" to assert that the scope of "author" in the Copyright Act did not include animals.[27] Thus, the court held that Naruto did not have statutory standing to bring suit under the Copyright Act.[28]

III. The Court's Presumption

The Ninth Circuit's decision created a presumption of humanity for the term "author" as it is used in the Copyright Act. The Ninth Circuit used the ruling in *Cetacean* to affirm that a statute must plainly extend protection to animals. However, what *Cetacean* does *not* assert is that, if a statute's terms *already* include animals, the animal plaintiff must reaffirm that the terms

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[22] *See id.* at 10.
[23] *Naruto*, No. 15-cv-04324-WHO, 2016 U.S. Dist. LEXIS 11041 at *5; *See* U.S. COPYRIGHT OFFICE, COMPENDIUM
[24] *Naruto v. Slater*, 888 F.3d 418, 426 (9th Cir. 2018).
[25] Brief of Agustin Fuentes, Primatologist, Macaque Expert, and Professor of Anthropology as Amicus Curiae in Support of Reversing the District Court, 888 F.3d 418, 426 (9th Cir. 2018) (No. 16-15469).
[26] *Naruto v. Slater*, 888 F.3d 418, 426 (9th Cir. 2018).
[27] *See id.*
[28] *See id.*

do so. Thus, the "plain statement" requirement in *Cetacean* has no bearing on whether the Copyright Act protects animal works, because the Copyright Act's use of the term "author" is already a plain statement that the Copyright Act protects animal-produced works. To impose a narrow definition onto the broad term "author" that excludes animals and require a "plain statement" to restore the term to its original breadth is to impose a presumption of humanity. This raises a problem: If the court imposed a presumption of humanity onto the term "author," then the courts limited the range of the Copyright and Patents clause of the Constitution and of the Copyright Act based on a presumption that was not expressly nor intentionally present in the language of the Act. This problem reaches beyond that of statutory standing for animals, for it shows how an anthropocentric bias can influence the judicial interpretation of a statute.

IV. The History of the Statutory Meaning of "Author"

To clear the air around the word "author" and how the court's presumption of humanity behind the word is indeed a presumption, this section will explore the history of the term and its exact legal meaning within the Act.

The United States Constitution gave Congress the power to "promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[29] The meaning of "writings" is specified in the Copyright Act as "original works of authorship fixed in any tangible medium of expression…"[30] These include literary works, musical works, and pictorial, graphic, and structural works.[31] Although the Act specifies the categories of original works of authorship, the Act does not expressly limit the term "author." The meaning of the term is important here

[29] U.S. Const. art. I, § 8, cl. 8.
[30] 17 U.S.C. § 102 (2020).
[31] *See id.*

because whether a creator is an "author" determines whether they have copyright protection under the Copyright Act.[32] Thus, the key to Naruto's and Congo's statutory standing is in whether they are "authors." If the act did not provide Naruto the possibility of owning his selfies, then the issue of his standing under the act would be clear and this paper would have no reason to exist. However, Naruto's authorship of his selfies is lost in a fog of interpretive ambiguity because a work's author determines its ownership, a determination that is not as clear cut as the Ninth Circuit wished.

The language of the act does not purely give rise to the term's nebulous nature, the Supreme Court's treatment of the term also broadens its meaning. In the case *Burrow-Giles Lithographic Co. v. Sarony*, the Supreme Court said that the terms "writings" and "author" are "susceptible of a more enlarged definition than this [a literary work and a literary author, respectively]."[33] The court was motivated to preserve the power of the Patent and Copyright Clause and so refused to limit the term to exclude works or makers that would progress the useful arts. Due to these policy-based motivations, the court related "author" to broad, universal labels like "originator" and "maker."[34] Thus, courts are meant to approach the term "author" with the term's broadest meanings in mind.

Despite the requirement to define "author" by its broadest meanings, some courts, such as the Ninth Circuit, decide to limit the breadth of the term to a point just out of reach of animal authors. As the Ninth Circuit reasoned, under *Cetacean*, where it previously addressed the broader question of Article III standing for animals, Congress must plainly state in the act that the Act protects animals.[35] This is where the Ninth Circuit court's presumption is most apparent.

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[32] 17 U.S.C. § 201 (2020).
[33] *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58, 4 S. Ct. 279, 281 (1884).
[34] *See id.*
[35] *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1179 (9th Cir. 2004).

The court did not interpret the term "author" as a plain statement that included animals in the Act's protected class because it presumed that all authors, in the broadest sense of the term, are human.[36] This is understandable. In our current state of affairs, to say that one is an author is not so much a statement of what one does as much as it is a statement of how one earns a living. In other words, being an author is a job. To imagine an animal directly engaged in employment and commerce is to imagine an absurdity. There are the well-known humorous photographs of chimpanzees in business attire, whole bodies of comedic cinema attributed to primate professionals,[37] and even idioms such as "monkey business" that are testaments to our current culture's approach to animal occupations.

This understanding of animal occupations should not matter to the Copyright Act. Congress uses the act to promote the useful arts, and the Act promotes the useful arts by protecting original works from infringement in the form of an enforceable copyright.[38] The Copyright Act, nor the Constitution, does not consider how a protected author uses the gains from the work or even if the author intended to enter the world of commerce through their work.[39] The Act's purpose is to incentivize creative advancements by affording an author a set of rights in an original work and prevent others from infringing on those rights.[40] Thus, the perceived absurdity of animal occupations should not matter to the question of whether to grant copyright protection to the original work of an animal author. This paper will later touch on

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[36] *Naruto v. Slater*, 888 F.3d 418, 426 (9th Cir. 2018).

[37] Monkey Up (Airbud Entertainment 2016); Bonzo Goes to College (Universal Pictures 1952); Funky Monkey (Franchise Pictures 2004); MVP: Most Valuable Primate (Keystone Family Pictures 2000), MVP 2: Most Vertical Primate (Keystone Entertainment 2001).

[38] 17 U.S.C. § 102 (2020).

[39] *See id.*

[40] 17 U.S.C. § 106 (2020).

concerns regarding how copyright protection could incentivize animal authors to create and add to society's wealth of creative works.

A. The Creative Animal

This proposal to protect animal authors under the Copyright Act raises the question: Are animals capable of being "originators" of original works sufficient to merit copyright protection? This question is not a purely legal one. Although it would be much simpler if it were. To grasp the concept of an animal author in its entirety, we must understand the requisite faculties, both legal and scientific, that an artist must have to create an original work. To do this, we must delineate the qualities that courts attribute to authors. However, we must also defer to science and the fields that are dedicated to cognition and animal behavior. This section will first delineate the thresholds of creativity that courts require for authorship and will later look at relevant discoveries in animal cognition that show how animals meet the requirements to cross the threshold of originality.

B. The Creative Animal in the Law

Within American courts, the threshold of originality for a work is "extremely low."[41] In *Feist Publications v. Rural Telephone Service Co.*, ("*Feist*") the landmark copyright case that defined the meaning of an "original work," the Supreme Court held that "original" means that a work was created independently and possesses at *least* a minimal degree of creativity "no matter how crude, humble or obvious it might be."[42] The Supreme Court then distinguished originality from novelty when it held that two identical works could be original if they were created independently.[43] Thus, negatively defined, an original work is any work of any degree of

[41] *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282, 1287 (1991).
[42] *See id*.
[43] *See id.*

creativity that is not the result of copying.[44] In this case, the line that the Court drew was that the mere alphabetic arrangement of entries in a phonebook was insufficient to cross the threshold of originality and that, "the selection or arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever."[45]

This enticingly simple approach to originality is not without its nuances. In *Meshwerks, Inc. v. Toyota Motor Sales U.S.A.*, ("*Meshwerks*") the Court of Appeals for the Tenth Circuit held that the plaintiff's use of a computer program to create exact CGI replicas of the defendant's cars lacked the requisite creative input to elevate the replicas above the *Feist* threshold and beyond the realm of mere copying.[46] However, in the case *Ets-Hokin v. Skyy Spirits* ("*Ets-Hokin*") the Court of Appeals for the Ninth Circuit held that the defendants' photographs of a vodka bottle that were nearly identical to the plaintiff's were protectable as original works.[47] The Ninth Circuit found that the defendants crossed the threshold of originality when they decided the angle, lighting, highlighting, and framing of the bottle.[48]

Viewed side-by-side, the courts' applications of the *Feist* threshold seems contradictory. Although the works in question in *Meshwerks* were CGI models and not photographs like in *Ets-Hokin*, the Tenth Circuit still judged the models as if they were photographs.[49] Much like how the defendants in *Ets-Hokin* decided the angle and lighting of their photos and so met the originality threshold, the *Meshwerks* plaintiffs decided the texture, color, and shading for the CGI rendering. Yet, the CGI models did not pass the threshold.[50] The *Meshwerks* decision becomes clearer when we consider it in the context surrounding *Feist*. In *Feist*, the Supreme

[44] *See id.*
[45] *See id.* at 1296.
[46] *Meshwerks, Inc. v. Toyota Motor Sales U.S.A.*, 528 F.3d 1258 (10th Cir. 2008).
[47] *Ets-Hokin v. Skyy Spirits Inc.*, 225 F.3d 1068 (9th Cir. 2000).
[48] *See id.* at 1083.
[49] *Meshwerks, Inc.*, 528 F.3d at 1263.
[50] *See id.* at 1268.

Court answered the question of whether an alphabetically arranged phonebook was an original work in the negative. For the *Feist* court, the actual content of the book was unoriginal and purely made of fact.[51] Although the structure of the facts did contain room for originality, a basic alphabetic structure was not enough to evince a minimal degree of creativity.[52] This shows that the court did not only look for intellectual effort but for creative activity a degree beyond mere effort. The Tenth Circuit in *Meshwerks* proposed that this extra degree is a showing of intellectual expression when it said,

> "The unequivocal lesson from *Feist* is that works are not copyrightable to the extent they do not involve any expression apart from the raw facts in the world."[53]

When we look at *Meshwerks* through this lens, we can see that the formal cause of the texturing or shading of the CGI models was not the expression of the creator's intellectual processes but of the literal details of the car, as it existed in a world of fact. Unlike the defendants in *Ets-Hokin*, who had adjusted the shading of their photos qua expression of their creative intellect, the *Meshwerks* plaintiffs adjusted the shading of their CGI models qua expression of the factual car.[54] It was the product of this form of intellectual process that the Tenth Circuit did not want to protect under the Copyright Act.

This gives us a fuller understanding of the threshold of originality and shows us that, although *Feist* sets the bar for creativity extremely low, courts employ the *Feist* threshold as a litmus test to find whether the work was the result of not only intellectual processes but intellectual expression.

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[51] *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282, 1295 (1991).
[52] *See id.* at 1297.
[53] *Meshwerks, Inc.*, 528 F.3d at 1265.
[54] *See id.*

C. The Creative Animal in Science

This understanding of the definition and judicial treatment of "author" raises the question: "Can animals produce an expressive work through an intellectual process?" I believe that the scientific literature on animal cognition shows that animals can meet this standard. I will present different discoveries that show how animals can act through insight rather than instinct, how expressive acts of animals are not mere expressions of instinctual impulses, and how animals use those acts to express their intellect instead of purely factual content.

The popular doubt that animals cannot create art or writings is understandable. To most, animal behavior is understood, not as a learned set of actions generated from the expressive will of the animal, but as a mere collection of instincts that are either curtailed or encouraged through an external action-reaction mechanism. However, science has long proposed that some animals are not simply slaves of biological instinct but have remarkable, creative control over their actions. Science has relied on the assumption that animals are creative so much so that American psychologist Robert Epstein developed his groundbreaking theory on creativity, the "generativity theory," by observing a group of pigeons develop solutions to a problem known as the box-and-banana problem.[55]

Wolfgang Kohler, the problem's original creator, developed the box-and-banana problem in opposition to Edward Thorndike's "law of effect," which asserted that impulsive action and reaction are the principle animus for animal actions.[56] The setup of a classic box-and-banana test is as such: A room contains an animal (a chimpanzee in Kohler's case), a bunch of bananas suspended from the ceiling just beyond the animal's reach, and a box that would give the animal

[55] Robert Epstein, *'Insight' in the Pigeon: antecedents and determinants of an intelligent performance*, 308 NATURE 61, 61-62 (1984).
[56] WOLFGANG KOHLER, THE MENTALITY OF APES 89 (Ella Winter trans., Fisher Press 2d ed. 2013).

the height needed to acquire the suspended fruit.[57] In Kohler's experiments, his chimpanzee subjects would not solve the problem through repeated attempts and failures but would solve the problem suddenly, directly, and continuously with only a visual understanding of the situation.[58] The chimpanzees would optically process the problem and then derive a solution through the use of sight perception alone.[59] Kohler understood this lack of a trial and error process to mean that the chimpanzees could solve the problem through "insight" rather than through the mere reinforcement of impulsive action and biomechanical reaction.[60] This demonstration of insight could only mean that the chimpanzees had devised and *created* their own method of solving the problem.[61]

Robert Epstein conducted his own rendition of the experiment with pigeon subjects and reached a similar conclusion.[62] Beyond Kohler, he found that the pigeon's learned repertoire of abilities (e.g. hopping, pecking, and pushing) informed the way they created their insightful solutions.[63] Pigeons that Epstein had previously trained to push and hop onto boxes utilized their training to acquire the banana, whereas pigeons that had no such training were less successful.[64] From this, Epstein developed "generativity theory" which proposed that an animal's capacity to create is not tied to an animal's accidental cognitive traits but is developed out of prior learned behavior.[65]

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[57] *See id.* at 166.
[58] *See id.* at 3815.
[59] *See id.*
[60] *See id.*
[61] *See id.*
[62] Robert Epstein, *'Insight' in the Pigeon: antecedents and determinants of an intelligent performance*, 308 NATURE 61, 61-62 (1984).
[63] *See id.* at 62.
[64] *See id.*
[65] ROBERT EPSTEIN, GENERATIVITY THEORY 759 (Steven Pritzker & Mark Runco eds., 1st ed. 1999).

Beyond primates, song acquisition in songbirds shows how some animal language is a learned, intellectual process rather than the result of strictly instinctual impulse. Since the late seventeenth century, ethologists had observed that the songs within a single species of bird varied greatly by locale.[66] These observations pointed to the notion that bird song was more than a genetically fixed action and was instead a result of "learned tradition."[67] W.H. Thorpe studied the process of song-learning in chaffinches and found that song tutorship from older birds played a key role in songbird song development.[68] Male chaffinches that were raised in isolated captivity developed the basic structure of a typical chaffinch song. However, their songs were distinctly different from their wild counterparts and lacked the complex flourishes that conspecific wild males exhibited.[69] Thorpe's findings show that, though it may be convenient to categorize animal behavior under the banner of instinct, deliberately learned culture and tuition play a significant role in the development of animal behavior.

A more remarkable example of animal creativity is Alex the Grey Parrot. Animal psychologist Irene M. Pepperberg observed the way that Alex acquired and developed English speech over the course of his life.[70] Upon teaching Alex basic labels for items, colors, and materials, she observed that Alex could transfer abstract terms to a variety of objects without any training apart from previously acquired basic terms.[71] On one occasion, after learning the label "rose hide" for a piece of red hide, Alex, unprompted, transferred the "rose" label to a piece of red paper and so dubbed the paper as "rose paper."[72] Alex eventually expressed an ability to

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[66] W.H.Thorpe, *The Process of Song-Learning in the Chaffinch as Studied by Means of the Sound Spectrograph*, 173 NATURE 465, 465-469 (1954).
[67] *See id.*
[68] *See id.* at 469.
[69] *See id.*
[70] Irene M. Pepperberg, *Creativity and Innovation in the Grey Parrot (Psittacus erithacus)*, *in* ANIMAL CREATIVITY AND INNOVATION 3 (Allison B. Kaufman & James C. Kaufman ed., 2015).
[71] *See id.* at 5.
[72] *See id.*

create novel combinations of phonemes and labels through soundplay.[73] Pepperberg recorded Alex when he was not in the presence of any trainers and found that he would combine previously learned phonemes with learned labels.[74] Alex the Grey Parrot not only demonstrated an understanding of abstract labels absent any conditioning or purely biomechanical reinforcement, but he also showed a self-motivated creative intent to express his vocalization techniques through soundplay.

These findings show that animals do have a capacity to cross the *Feist* threshold of originality. The expressions of animals, whether it be through vocalizations, problem solving, or painting all lie beyond the realm of purely mechanical action or instinctual impulse. Although we do not see birds flesh out entire pieces of literature, their ability to create is undeniable. If we revisit the artistic progression of Congo the painting chimpanzee while lending an ear to Epstein, we can see how generativity theory could explain how Congo's stylistic progression was also a creative progression. From repeated exposure to creative media (i.e. paint, brushes, and canvas), Congo was able to apply previous painting experiences to inform his later works.

The second reason why animals can fulfill *Feist*'s originality requirement is that their productions are not slaves to the reproduction of fact but are expressive. Desmond Morris found through observing Congo and other chimps that they, as much as humans, have an "inherent need to express themselves aesthetically."[75] He noted that, without means such as paint and canvas, chimpanzees expressed themselves through more gymnastic, rhythmic means of aesthetic expression.[76] Further, Morris observed that Congo's paintings became distinct to

[73] *See id.* at 7.
[74] *See id.*
[75] DESMOND MORRIS, THE BIOLOGY OF ART 151 (Methuen & Co. Ltd., 1st ed. 1962).
[76] *See id.*

himself.[77] The chimpanzee developed a signature "fan pattern" and would embellish on the theme, unlike the creations of most other chimpanzees.[78] The mere observation of Congo's signature fan-pattern compositions, characterized by expressive brush strokes and a consistent, yet evolving theme strongly suggests that Congo did not create for the purpose of factual representation. The strongest explanation for the phenomenon is that Congo was expressing his understanding of painting.

We can see that Congo the chimpanzee and Alex the Parrot produced works using a faculty that was beyond the purely biomechanical and that those animals created works as expressions of their creative understanding, not as expressions of fact. They were undoubtedly the "originators" of their works and the works themselves would certainly pass the Supreme Court's threshold of originality since they bear a seed of non-factual, intellectual expression. Thus, to consider the term "author" as it appears in the Copyright Act, as a term that inherently excludes animals is an oversight of decades of scientific discovery and research.

V. Animals as Property Owners Generally

Another possible part of the reason why the Ninth Circuit believed that the Copyright Act did not plainly include animals in the definition of "author" was because the idea of securing a legal right for an animal seemed to fly against the reasons why human societies implemented laws in the first place. To invite animals into our legal systems would sweep the anthropocentric foundations out from underneath our current legal and political structures. However, to say that natural entities do not already exist in ordered systems of law is to ignore a wealth of ethological discoveries, indigenous conceptions of law, and even parts of our own legal structure that say

[77] *See id.* at 94.
[78] *See id.* at 101.

otherwise. This section focuses on the general concept of animal property owners and broadly surveys the current state of animal property ownership.

A. A Bundle of Animal Property Rights and the Animal Family

According to the popular "bundle of rights" approach to property rights, we can break down the core subject matter of private property ownership, intellectual property included, into these key categories: acquisition, control, exclusion, and disposition.

Property acquisition and control determines how a person comes to own and use a land parcel. For chattels or personal property, social norms and legal causes of action generally establish that a person owns an unclaimed object or parcel when they exert full control over it. Justice Blackstone detailed a two-step process for acquisition of land: The first step is prolonged occupancy and the second, investment of labor.[79] This process is derived from the effects of continued occupancy of a parcel of land such as building a house or maintaining the piece of property.

Humans exercise the right of exclusion when they physically mark boundaries such as fences, occupy spaces such as placing a car in a parking space, or threaten trespassers. Beyond these purely physical exercises, humans also manifest the right to exclude through nonviolent, ritualized forms of boundary enforcement. For example, humans can file a legal action against a trespasser that is enforced by a court order. Even beyond the courts, humans in close-knit communities can operate under a system of norms outside of the legal system.[80]

[79] KAREN BRADSHAW, WILDLIFE AS PROPERTY OWNERS: A NEW CONCEPTION OF ANIMAL RIGHTS 46 (2020).
[80] *See id.*

Transferring parcels is another fundamental part of human property systems. Humans determine modes of land transfer through sets of rules and a legal system that enforces and validates when or what parcels are successfully transferred.[81]

There is no necessary reason to exclude animal actors from the bundle of rights doctrine that underlies western human property systems. These key elements of property ownership are not exclusive to humans. Legal scholar Karen Bradshaw explored multiple examples that show how non-human life has formed and actively upheld systems of property that broadly consist of the same bundle of rights that humans use. Under the stance that humans are not categorically distinct from animals, it could be said that the bundle of rights may not even be of human origin but could stem from humanity's natural state.

Bradshaw proposed that various animals can meet Justice Blackstone's test for property acquisition. Prairie dogs construct permanent residences on land parcels and continuously maintain the land they inhabit.[82] Apart from creating residences, predator animals invest their labor in the land through activities like hunting.[83] By killing prey species, carnivorous animals control population sizes and consequently manage resource use in their territory.[84]

To exclude others from their parcels of land, jaguars use distinct piles of leaves to mark their territorial boundaries, lions use scent to establish boundaries, and the lizards use dances to ward others off their property.[85] Animals even engage in non-physical dispute resolution through social norms.[86]

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[81] *See id.*
[82] *See id.* at 49.
[83] *See id.*
[84] *See id.*
[85] *See id.* at 50.
[86] *See id.* at 52.

Bradshaw also found that animals engage in ordered systems of property transfer. Mother jaguars will share and give their home range to female offspring but will force male offspring off of the territory.[87] Generations of fish evince inter-generational property transfer by annually returning to the same spawning river.[88] Dominant male lions oust maturing male cubs from the pride if they are not of their direct lineage.[89] Some males go so far as to kill younger cubs to ensure that the pride and its accompanying property rights are afforded only to the dominant male's bloodline.[90] These phenomena not only show that animals engage in structured property transfers but also engage in such transfers with an understanding of child legitimacy and familial succession.

It is important to note that animal conceptions of family and intergenerational property are not strikingly different from our own. Monogamous relationships are not exclusive to humans. Birds display an intent to cohabitate with and form socially monogamous "family units" with a life partner.[91] A study on the breeding biology of American crows shows that breeding pairs receive auxiliary rearing help from their matured offspring in a "help out the parents" phenomenon.[92] In this way, breeding pairs allow an extended family to inhabit the initial natal property, creating a joint, family-owned parcel of land. These examples of animal property systems show that animals are not detached from the same property concepts that humans use and value property interests.

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[87] *See id.*
[88] *See id.*
[89] Borrego et al., *Lion Population Dynamics: do nomadic males matter?*, 29 BEHAVIORAL ECOLOGY 660, 661-666 (2018).
[90] *See id.*
[91] Simon C. Griffith, *Cooperation and Coordination in Socially Monogamous Birds: Moving Away From a Focus on Sexual Conflict*, 7 FRONTIERS IN ECOLOGY AND EVOLUTION 455 (2019).
[92] June A. Chamberlain-Auger et al., *Breeding Biology of American Crows*, 102 THE WILSON BULLETIN 615, 617-620 (1990).

VI. Naruto in a New Light

When we reconsider the Ninth Circuit's holding in *Naruto*, this time in light of all that was discussed above, the court's belief that the Copyright Act did not plainly extend protection to animals is concerning. It is true that in *Cetacean* the Ninth Circuit established that an act's language must plainly extend protection to animals. However, the rule did not say that if an act's terms did already include animals, that those terms be separately reaffirmed to do so. As was said earlier, courts must construe the term "author" in its broadest sense to mean "originators of original works."[93] The Supreme Court and the circuit courts defined "original works" as those that went beyond mechanistic production and evinced a minimal degree of creativity and intellectual expression.[94] Studies in animal cognition and creativity by Koehler, Epstein, and Pepperberg show that animals are not reactionary beings bound by instinct but are insightful, self-determining actors. Furthermore, animals manifest a desire to express their creative faculties, whether it be through paint or through sound. Thus, if we apply the tests of authorship to animal works with the above knowledge in mind, we can see that the works of an animal can satisfy those tests.

Regarding the linguistic context and associated terms surrounding the term "author," the terms that the Ninth Circuit highlighted (i.e. "wife," "widow," "legitimate," and "grandchildren") are not exclusive to humans. Animals participate in social monogamy just as some humans do and also evince an intent to cohabitate with another being for life. Lions not only distinguish between their legitimate and illegitimate children, they transfer property rights accordingly. American crows form extended family relationships, jointly owning and managing property. Thus, these terms cannot be touted as the gates that keep the term "author" exclusively within the

[93] 17 U.S.C. § 102 (2020).
[94] *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282, 1287 (1991).

realm of humankind as much as the canon of associated words cannot be the sole determining canon of statutory construction for the Copyright Act.

This information is not new but is underrepresented. Popular stereotypes and misconceptions surrounding ethology and animal cognition still dominate our society's understanding of animals, leaving little room for us to consider the realities of non-human minds. Given these misconceptions, it is understandable why the court held that the Copyright Act plainly excluded animals from its protection. However, it is more than possible that the act plainly encapsulates animal authors within its language and can vest all authors of original works, both animal and human, with an enforceable copyright. If the Supreme Court adapted to scientific advancements in photography in *Burrow-Giles Lithographic Co. v. Sarony*, weaponry in *Caetano v. Massachusetts*, and human neurology in *Roper v. Simmons*, there is no compelling reason for lower courts to ignore advancements in animal cognition in favor of archaic notions of animal behavior.[95]

VII. Can Copyright Save the Environment?

There remains a question that casts a shadow over the basic idea of animal copyright: What would an animal do with a copyrighted work? Alternatively: Would an animal copyright be consistent with the purpose of the Copyright Act in incentivizing creative works? In this section, I touch on how an animal copyright can incentivize animal creations and enforce animal copyrights through trusts that humans implement in tandem with ecosystem level land trusts for animal beneficiaries.

By itself, an animal may not have the means to make use of a copyright. However, if we placed the copyrighted works into a trust and name the animal author as the beneficiary, a human

95 Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58, 4 S. Ct. 279, 281 (1884); *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1031 (2016); *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

trustee would have the fiduciary duty to manage the works for the benefit of the animal, enforce the copyright, and allow the benefits of the copyright to flow to the animal. Under this duty, the trustee would fulfill the copyright's purpose by litigating infringement and ensuring continued expression. Aside from ensuring benefits like habitat preservation that enable the animal to continue producing works, the trustee would ensure that the animal has the resources and space to continuously create works and receive the resulting copyright benefits. When this kind of trust is paired with an ecosystem trust, animal copyrights could provide valuable financial means to protect both animals' welfare and environment. This is a particularly valuable means to promote the creation of future works when animals like the Black Crested Macaque, are critically endangered due to habitat loss and poaching.[96]

The idea of a land trust that vests the land's animal inhabitants with interests in the property as beneficiaries is bizarre but within the realm of legal possibility. Wildlife habitats could be put into a trust and have its inhabitants listed as beneficiaries. Human trustees would then operate under a fiduciary duty to beneficially protect and manage the habitat.[97] Karen Bradshaw detailed how, under these trusts, private governance committees could guide trustees to make choices that are in the animals' best interests and determine the standards of care for the trustees.[98]

Under this backdrop, a trustee for an animal copyright could become a trustee for the animal artist's land trust and allocate portions of the benefits from the copyright for the management of the animal's ecosystem, to protect the author's ecosystem from the threats most immediate to their wellbeing such as habitat loss, or to remedy any injuries the ecosystem incurs

[96] Jennifer S. Holland, *For These Monkeys, it's a Fight for Survival*, NATIONAL GEOGRAPHIC (March 15, 2017), https://www.nationalgeographic.com/magazine/2017/03/macaques-monkeys-indonesia-endangered-pet-trade/.
[97] KAREN BRADSHAW, WILDLIFE AS PROPERTY OWNERS: A NEW CONCEPTION OF ANIMAL RIGHTS 66 (2020).
[98] *See id.* at 67.

from human intrusion. Additionally, since this protection is effectively achieved at the ecosystem level, this approach allows the benefits of an animal copyright to flow to the entire ecosystem, holistically securing the wellbeing of the interdependent web of organisms within.

VIII. Conclusion

The decision in *Naruto* speaks to more than whether the Copyright Act protects animals. It illustrates how the normative divide that humans impose between themselves and animals creates notions of animal existence that do not comport with natural reality and how those misinformed notions create presumptions in our courts. It also shows that, despite the progress courts have made to embrace science, inconsistencies in the ways courts use science to inform judicial interpretation still exist. While a decision that overturns *Naruto* and grants a copyright for a macaque will not single-handedly bridge the crude dichotomy of the enlightened human and the lowly animal, it will make room for a scientifically informed understanding of natural entities to take hold. It can not only demonstrate that animals can creatively express themselves free from an instinctual animus, but reveal that we are not as separate from nature as our laws suggest.

In a social and political climate gripped by natural disasters of increasing intensity and a pandemic that may well have resulted from animal exploitation, affording animals copyright speaks to a greater need to recognize our environment as something to coexist with, rather than exploit. Allowing ourselves to take advantage of the habitats that animals depend on while providing few legal protections that truly benefit natural entities enables us to indulge in a false sense of sustainable dominance over the earth. By relegating natural entities to the status of mere property, our property laws help us forget that we are ultimately dependent on the earth for our survival. Despite this dependency, we are responsible for countless acres of habitat destruction,

an approximate one thousand percent increase in extinction rates, a global temperature that spells disaster for various ecosystems, and a new era of mass extinction.[99] Recognizing that, under the Copyright Act, animal artists deserve and can enjoy the same protections given to humans is a step forward in preserving life and liberating natural entities from the category of mere disposable property. The words of Alex the Parrot, the paintings of Congo the Chimpanzee, and the songs of the Chaffinch are not only expressions of intellect; they are reminders that, behind those expressions, are independent lives and minds whose futures are dictated by the whims of humans who leave them unprotected. Although we may have let the rights for animals like Congo and Naruto fall, it is not too late to help them stand in our courts.

Untitled Abstract, tempera on paper.[100]

[99] E.O. WILSON, HALF-EARTH: OUR PLANET'S FIGHT FOR LIFE 54, 55 (2016).
[100] Congo the Chimpanzee, *Untitled Abstract* (illustration), *in* BONHAMS (June 20, 2005), https://www.bonhams.com/auctions/11928/lot/29/ (last visited Nov. 8, 2020).

Law And De-extinction: How The Current Legal Landscape Inadequately Considers The Revival Of Extinct Species

Kai Mindick
Cornell Law School
Class of 2021

Law and De-extinction: How the current legal landscape inadequately considers the revival of extinct species

INTRODUCTION

When people first read the Jurassic Park novel in 1990, it seemed so farfetched and fantastical.[1] How on earth could a corporation clone an extinct animal, let alone populate an entire island with them? At the time, the answer was simple: it was after all a science fiction novel, so the accuracy of the novel was irrelevant. Yet, thirty years have passed since the novel's release and each year biological technology has improved. Now, as of 2021, cloning is commonplace. As will be discussed in greater detail, livestock, dogs, and other animals are cloned more often than a layperson realizes. While the cloning of these animals certainly raises a swathe of ethical questions, an even greater question arises: How does the law apply when an extinct animal is biologically resurrected through the cloning process? While the answer is not clear, it is not the first-time application of law to a scientific fact that at one time seemed relegated to the land of science fiction, has been asked.

Indeed, this type of prophecy is rather commonplace. *Star Trek* introduced the idea of a mobile phone in 1966, *The Terminator* showcased military drones in 1984, and countless other examples exist.[2] Unfortunately, at the root of convergence of law and these technologies lies one of the key debates in the legal academy: should law predict and solve issues, or should it merely be a tool used in response.[3] This very question dominated the legal discourse during the advent of the internet in the 1990s. At the first law of the internet conference, Judge Frank Easterbrook famously argued that to make a law for the internet is analogous to making a law for a horse.[4] One should instead focus on applying existing blackletter contract, tort, and other such laws to the internet just as one would do for horse-related dispute. As time went on, some argued that

[1] *See* Michael Crichton, *Jurassic Park* (1990).
[2] *See* Dave Johnson, *9 predictions from old sci-fi movies that actually came true,* May. 11, 2019, available at https://www.businessinsider.com/sci-fi-movie-predictions-2019-5#military-drones-the-terminator-1984-8.
[3] *See* Louis M. Brown, *Preventative Law* (1950).
[4] *See* Frank H. Easterbrook, *CYBERSPACE AND THE LAW OF THE HORSE*, 1996 U Chi Legal F 207.

Judge Easterbrook's prediction was wrong, and the internet did indeed require new forms of governance due to the old law's insufficiencies.[5]

The ultimate goal of this paper is to understand how the law, as is, applies to the process of de-extinction and whether perverse legal outcomes require a change to the law, or a new regime altogether. Scholarship in this particular area is sparse. Other legal articles have discussed the implication of the Endangered Species Act (ESA) and how it would apply to de-extinction projects.[6] However, the scholarship has neglected two important issues that will be discussed in this paper. First, existing scholarship neglects the entire de-extinction lifecycle and instead focuses primarily on the mere applicability of the ESA and the reintroduction of formerly extinct species into the wild.[7] Second, the existing literature does not discuss the unique legal considerations that managers of de-extinction projects must face.[8] Part I of this paper will provide a backdrop for which the law is to be applied, discussing relevant technologies as well as the consequences of de-extinction. Part II will examine the language of the ESA and offer a multifaceted legislation and suggest how the government may be compelled to undertake or support de-extinction projects. Part III will apply the current law to the process of de-extinction by focusing on the regulations that govern cloning technology, research animal conditions, and species integration. Finally, Part IV will focus on shortcomings that have been unearthed in the previous sections and offers solutions for how legislators can better prepare a legal regime to handle de-extinction.

Part I: Cloning, and the Consequences of De-Extinction

Fundamentally, this section will address two underlying considerations in the de-extinction debate. First, as regulatory approaches often change depending on the process used to

[5] *See* Andrew Murray, *Looking Back at the Law of the Horse: Why Cyberlaw and the Rule of Law are Important*, (2013) 10:3 SCRIPTed 310. Available at https://script-ed.org/article/law-horse-cyberlaw-rule-law-important/
[6] *See* Norman F. Carlin et al., *How to Permit Your Mammoth: Some Legal Implications of "De-Extinction"*, (2013), available at https://law.stanford.edu/wp-content/uploads/2018/05/carlin.pdf
[7] *Id.*
[8] *Id.* (There are three exceptions to this statement. The cited article discusses the application of the National Environmental Policy Act, GMO regulation, and patent law to de-extinction projects. However, for the purposes of concision and brevity, these three areas are not included as they are not as vital to the de-extinction lifecycle).

achieve a result, technology that can be used to perform biological resurrection will be examined.[9] As a subset, given that there are multiple technologies that may be utilized to achieve de-extinction, the reason for choosing cloning over the others will be explored. Second, the consequences of de-extinction will be evaluated so as to illuminate considerations that the law must be aware of.

Three technologies have been suggested as possible means of achieving de-extinction. As the title of this subparagraph suggests, cloning is the technology that has the most potential in this regard. The other technologies are genome editing and back breeding. Genome editing occurs when a scientist uses a method such as CRISPR, edit the reproductive material (i.e., eggs and sperm) of an animal closely related to the extinct species, and then the offspring should in theory be born with a very similar makeup to the extinct animal.[10] However, this method does not produce as exact a replication of the extinct species as does cloning, granted however, that unlike cloning, this method can be used even if the cell tissue is highly degraded so it is the preferred method for some extinct animals.[11] Back breeding is more of a strategic technology than something highly technical like the other two methods. Back breeding as a solution to de-extinction requires the intentional breeding of animals with "throwback" genetic traits that are similar to their extinct relatives or ancestors. Through this selective process, an animal similar to the extinct species is created.[12] However, this is a much less scientifically reliable approach, for one cannot readily anticipate when these traits will surface and like genome editing, it is not as accurate as cloning with respect to the genetic makeup of the extinct animal.[13]

a. Cloning Technology

[9]Greg Jaffe, *USDA revised regulations of GMO and gene edited plants. Here's what it means*. Cornell Alliance for Science. Jun. 8, 2020, available at athttps://geneticliteracyproject.org/2020/06/08/usda-revised-regulations-of-gmo-and-gene-edited-plants-heres-what-it-means/ (USDA regulates genetically engineered plants by the process used to modify the organism. For example, gene gun and agrobacterium modified plants are regulated differently, even if the editing arrives at the same end result).

[10]*See* Giulia Palermo, et al. *The invisible Dance of CRISPR-Cas9. Simulations unveil the molecular side of the gene-editing revolution.* Phys Today. 2019 Apr, 72(4):30-35.

[11]David Shultz, *Should we bring extinct species back from the dead?*, Sep. 26, 2016, available at https://www.sciencemag.org/news/2016/09/should-we-bring-extinct-species-back-dead

[12]*Id.*

[13]*Id.*

Cloning is a more exacting way to biologically resurrect a species and as such, is the method that is widely accepted as ideal for this process. Cloning operates by taking an egg without a nucleus from the extinct species' closest living relative and then inserting the nucleus from a conserved cell from the extinct species into said egg. Then, the new egg can be artificially placed in the extinct species' nearest living relative and an identical replication of the extinct species will be born.[14] While it is true that no extinct species have yet been publicly revived with this or any of the aforementioned methods, it should certainly be possible as cloning commonly occurs in multiple settings and researchers are making significant process with respect to cloning extinct species.

If you ate a hamburger recently, there is a chance that the beef came from a cloned cow. The Food and Drug Administration (FDA) has found cloned animal products to be safe and does not require a food label to contain reference to the fact that the meat was cloned.[15] Similarly, if you happened across a polo match there is a chance that the stud horse was also cloned.[16] On a final note, if you notice that your neighbor's dog is somehow forty years old and still alive, it may be because they utilized a commercial pet cloning service to clone their beloved companion.[17] All of these instances point to the effectiveness and widespread use of animal cloning. However, as the reader likely notices, none of these animals are extinct. But as previously mentioned, progress is being made on that front.

[14]*See* Beth Shapiro,*Pathways to de-extinction: how close can we get to resurrection of an extinct species?*, Functional Ecology Vol. 31 Issue 5., May. 2017.
[15]*See* F.D.A., Animal Cloning and Food Safety, Aug. 10, 2018. Available at https://www.fda.gov/consumers/consumer-updates/animal-cloning-and-food-safety.
[16]*See* Haley Cohen, *HOW CHAMPION-PONY CLONES HAVE TRANSFORMED THE GAME OF POLO*, Aug. 2015, available at https://www.vanityfair.com/news/2015/07/polo-horse-cloning-adolfo-cambiaso
[17]*See* ViaGen, Dog Cloning in the U.S., available at https://viagenpets.com/dog-cloning/#:~:text=Clone%20your%20Dog&text=A%20cloned%20dog%20is%20simply,born%20at%20a%20later%20date.&text=Your%20veterinarian%20will%20collect%20a,the%20same%20genetic%20make%2Dup.

Teams across the world are diligently working to biological revive extinct species. Russian and South Korean scientists are working to clone the extinct Steppe Bison.[18] Efforts are being made to clone the Siberian cave lion.[19] Perhaps most famously, Japanese scientists are working to clone the wooly mammoth, and they recently made a breakthrough with recovered cells showing signs of life.[20] At this rate, it is inevitable that an extinct species will be cloned and reintroduced into the environment. In fact, with the black-footed ferret cloning in 2021, this strategy is now being used to boost an endangered species population in the U.S.[21]

Given the prevalence of cloning in this space, it is very likely that de-extinction projects will continue to utilize cloning technology and thus it is an important technological focus for discussion of the law of the applicable technology as it relates to de-extinction.

b. The Consequences of De-Extinction

It is important to assess the consequences, both negative and positive, of de-extinction as they may ultimately shed light on how the law currently does not adequately handle the externalities of de-extinction. Similarly, it is possible that the law restrains potential boons provided by de-extinction. There is a plethora of arguments for why de-extinction project should and should not commence. However, the purpose of this paper is not to suggest a direction to take. Rather, the paper contemplates the inevitable de-extinction and its accompanying consequences regardless of whether de-extinction, on balance, is a net positive.

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[18]*See* Lea Surugue, *Cloning ancient extinct bison sounds like sci-fi, but scientists hope to succeed within years*, Dec. 2, 2016. Available at https://www.ibtimes.co.uk/cloning-ancient-extinct-bison-sounds-like-sci-fi-scientists-hope-succeed-within-years-1594574

[19]*See* The Siberian Times Reporter, *South Koreans kick off efforts to clone extinct Siberian cave lions*, Mar. 4, 2016, available at http://siberiantimes.com/science/casestudy/news/n0606-south-koreans-kick-off-efforts-to-clone-extinct-siberian-cave-lions/

[20]*See* Staff, *Japanese scientists make breakthrough in cloning a woolly mammoth*, available at https://www.dw.com/en/japanese-scientists-make-breakthrough-in-cloning-a-woolly-mammoth/a-48063060#:~:text=Asia-Japanese%20scientists%20make%20breakthrough%20in%20cloning%20a%20woolly%20mammoth,have%20shown%20signs%20of%20life.&text=Cell%20nuclei%20from%20the%20mammoth,successfully%20implanted%20in%20mouse%20cells.

[21]Associated Press, *Scientists clone the first U.S. endangered species*, Feb. 18, 2021. Available at https://www.nbcnews.com/news/animal-news/scientists-clone-first-u-s-endangered-species-n1258310

Diving into the advantages of de-extinction, one can find perhaps the largest such benefit articulated in ESA case law. The Supreme Court in *Tennessee Valley Authority v. Hill*, when describing why it is important to preserve endangered species wrote that "The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve and may provide answers to questions which we have not yet learned to ask."[22] Similarly, de-extinction project may surface potential resources with respect to medicine or other unique features that may be of benefit to humanity, even if it is not readily apparent. Other scholars have noted that de-extinction may lead to greater appropriation for conservation funds, as the exciting idea of seeing, for example, a wooly mammoth or a dodo bird may engender deep public support.[23] Lastly, a highly abstract advantage is that some argue that, at least for the revival of species that became extinct due to human interference, that humanity owes a morale duty to bring these animals back from the nether.[24]

The disadvantages of de-extinction are equally compelling. Some scholars believe that overzealous de-extinction efforts will take away from greater priority issues, like climate change, which if not handled expediently may result in thousands more extinct species.[25] Similarly, these newly de-extinct animals may very well act as an invasive species and cause significant damage to their ecosystem as a whole.[26] Finally, there is a negative morality factor to consider. Not only will these not be exact replicants of the species as they existed in the wild, but the wild has likely changed as well. It is highly probable that there are diseases and other illnesses that a de-extinct animal would be incredibly vulnerable to.[27] On a similar note, cloned animals can die very

[22]*See, TVA v. Hill,* 437 US 153, 98 SCt 2279, 57 LEd 2d 117[1998].
[23]*See* Patrick M. Whittle et al., *Re-creation tourism: de-extinction and its implications for nature-based recreation*, Apr. 15, 2015, Current Issues in Tourism Vol. 18. Issue 10.
[24]*See*, Alissa Greenberg , *A Brief Look at the Ethical Debate of DeExtinction*, available at http://2013.igem.org/wiki/images/8/8f/De-Extinction_Ethics.pdf
[25]*See* Paul Ehrlich & Anne H. Ehrlich, *The Case Against De-Extinction: It's a Fascinating but Dumb Idea*, Jan. 13, 2014, available at https://e360.yale.edu/features/the_case_against_de-extinction_its_a_fascinating_but_dumb_idea
[26]*See* Jason Koebler, *Reviving Extinct Animals Could Lead to 'Invasive Species From the Past'*, Apr. 4, 2013, available at https://www.usnews.com/news/articles/2013/04/04/reviving-extinct-animals-could-lead-to-invasive-species-from-the-past
[27]*See* Douglas J. Richmond et al.,*The potential and pitfalls of de-extinction*, Sep. 27, 2016, Zoologica Scripta. Vol. 45 Is. S1.

quickly and lead less healthy lives than their natural counterparts.[28] As such, if cloning is the chosen technology for de-extinction, it is likely that animals will be brought into this world with a high likelihood that they will suffer.

Thus, given the juxtaposed pros and cons of de-extinction, it is unclear whether there is an ideal path, but as iterated, it these concerns should be considered by the law.

Part II: De-extinction Projects and the Government's Obligation

A key question regarding the government's involvement in the de-extinction arena is whether it is mandatory or discretionary. There are certainly tangential ways the government may at its leisure, choose to support de-extinction efforts. This may be achieved through various biodiversity grants, perhaps through that National Science Foundation (NSF).[29] Indeed, grants may even be through the Department of Defense (DoD) if an argument can be made that the extinct species can somehow provide genetic materials to solve puzzles facing the military (e.g., certain bacterial immunity or resistance believed to exist in an extinct animal). However, these methods of support de-extinction methods are not due to an onus placed on the government. Yet, a reading of the ESA might compel the government to action. As will be addressed, this is dependent on whether an extinct animal can be defined as a threatened or endangered species and whether a recovery plan can properly be read to include a de-extinction project.

a. Are Extinct Animals Endangered or Threatened Species?

The ESA places a burden on the Secretary to determine through promulgation of regulation whether any species is endangered or threatened.[30] The Secretary is then required to consider five factors in determining if the species is endangered or threatened, and if any of the

[28]*See* K. Heðinsdóttir et al., *Can Friends be Copied? Ethical Aspects of Cloning Dogs as Companion Animals*, Jan. 12, 2018, Journal of Agricultural and Environmental Ethics volume 31, pages 17–29.
[29]*See,* NSF. Dimensions of Biodiversity. Available at https://www.nsf.gov/funding/pgm_summ.jsp?pims_id=503446.
[30]*See,* 16 USC §1533(a)(1); *see also,* 16 USC §1532(15).

five factors result in the classification of a species as threatened or endangered, it must be deemed as such. For example, one factor is whether "other natural or manmade factors affecting its continued existence."[31] In the scenario of an extinct animal, a natural factor could very well be read to include death. Yet, satisfying this factor is only the first part of the analysis. The second is whether an extinct species fits squarely within the threatened or endangered species definition. The term "threatened species" means "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[32] The term "endangered species" means "any species which is in danger of extinction throughout all or a significant portion of its range."[33]

Unless something that is in danger of extinction can be simultaneously extinct, then an extinct species clearly does not fit within the definition of endangered species. Perhaps a clever attorney may one day argue that the very idea of *remaining* extinct is tantamount to being in danger of *permanent* extinction. However, there is an alternative to fit an extinct species into the ESA.

If a threatened species is one that is likely to become an endangered species, then the very possibility of a de-extinction project would place the currently extinct species as categorically threatened. After all, if a private effort to clone, say, a wooly mammoth was to succeed then it would by all means be an endangered species and in theory, the Secretary would be required to declare it as such. Thus, if cloning technology progresses to the point that it is

[31] *See,* 16 USC §1553(a)(1).
[32] *See,* 16 USC §1552(20).
[33] *See,* 16 USC §1532(6).

likely result in de-extinction, then the recovery of a preserved cell with an intact nucleus would automatically create a fact pattern where the extinct animal would be a threatened species.

b. De-extinction Projects as Recovery Plans

Upon the classification of the extinct animal as a threatened species, the Secretary is required to develop and implement a recovery plan "for the conservation and survival" of the species.[34] Given that the only possible way to resurrect the threatened animal would be through technology (i.e., the operating assumption is that cloning will be used), the Secretary would be required to utilize cloning as part of the recovery plan.

Furthermore, it is not as if the government must be the one to execute the plan, as the secretary "may procure the services of appropriate public and private agencies and institutions." Granted, this usage of high technology is not generally considered the expertise of the Fish and Wildlife Services (FWS) or National Marine Fisheries Service (NMFS), the agencies that are charged with administering the act.[35] However, the Secretary may utilize any public agency expertise as part of its recovery plan, so a lack of technological knowledge will not be a pitfall to the implementation of such a plan, for interagency agreements, perhaps with the National Institute of Health (NIH) can be utilized to ensure the proper expertise is utilized in the implementation and development of such a plan.

Regardless of whether the cloning project stems from the mere finding of a preserved cell containing a nucleus of an extinct animal, or whether the burden is placed on the Secretary consequent to a private party successfully cloning but one member of an extinct species, the rules and regulation that apply to threatened and endangered species are therefore just as applicable to a species that is duly extinct. This idea is further entrenched by the deference of courts to agency expertise.[36] Perhaps the one issue that the Secretary may face is with respect to the question of

[34]*See,* 16 USC §1553(f)(1).
[35]*See,* 16 USC §1531, et. Seq.
[36]*See, Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.,* 467 US 837[1094].

whether to revive a species is so morally and financially significant that it could not have possibly been delegated to an agency.[37]

Part III: How the law governs the de-extinction lifecycle

Even if there is no mandate to begin the process of de-extinction under the ESA, de-extinction projects will continue to be performed and will then trigger questions about the applicable of the law to the project's lifecycle. As such, this section contemplates the regulation of cloning technology, the status of the extinct animal while in a laboratory after being cloned, and how the law could apply to the re-introduction of extinct animals into the wild.

a. Cloning and FDA Regulation

While the intuitive agency to regulate cloning for de-extinction certainly seems to be the FDA, it is still not entirely obvious if this is the correct outcome. If nothing else, the FDA has performed a myriad of studies on cloning as it pertains to food safety, so it can be argued that of all agencies, the FDA is best suited to regulate de-extinction via cloning.[38] Furthermore, while the FDA does not believe that de-extinction via cloning will be possible in the near future, they include a comment in their animal cloning frequently asked questions webpage stating that "So although [de-extinction via cloning is] possible, we wouldn't expect that you'd see this at this time or in the near future.[39] Arguably, this is the FDA asserting a subtle claim of jurisdiction over the issue. Yet, because the FDA chooses to treat de-extinction as so far out of reach, the regulatory landscape with respect to using cloning for this technology is entirely a blank slate. In fact, the FDA has not delved into the topic of cloning for quite some time with its most recent guidance more than ten years old.[40]

[37]*See, FDA v. Brown & Williamson Tobacco Corp.,* 529 US 120 [2000].
[38]*See* FDA. Animal Cloning: A Risk Assessment. Center for Veterinary Medicine. Jan. 8, 2008. Available at https://www.fda.gov/files/animal%20&%20veterinary/published/Animal-Cloning--A-Risk-Assessment.pdf.
[39]*See* FDA. Myths about Cloning. Jun. 11, 2020. Available at fda.gov/animal-veterinary/animal-cloning/myths-about-cloning.
[40]*See* F.D.A *CVM GFI #179 Use of Animal Clones and Clone Progeny for Human Food and Animal Feed*, Jan. 2008. available at https://www.fda.gov/regulatory-information/search-fda-guidance-documents/cvm-gfi-179-use-animal-clones-and-clone-progeny-human-food-and-animal-feed.

As discussed, the FDA's cloning jurisdiction has found its hook in the agency's broad power to regulate food. But extinct animals are not intended for consumption. Drawing an analogy to human cloning, in a 1998 Dear Colleague letter, the FDA asserted that it had jurisdiction over the practice, albeit while not sharing with the public as to exactly how human cloning fits into the definition of 'drug'.[41] Just like the FDA has jurisdiction over human drugs it also has jurisdiction over animal drugs.[42] Animal cloning likely meets the statutory definition with ease, as a "new animal drug is any drug intended for use for animals other than man."[43] Then, the definition of drug can mean "articles intended to affect the structure or any function of the body of man or other animals."[44] Since the cloning process is intended to affect the structure of both the cloned animal and the close living relative that carries the clone, it is sensibly covered by the definition of new animal drug.

b. The Land of the Living, Laws that Regulate the Treatment of a De-extinct Animal

Should an extinct animal come into being, the unique circumstances of its newfound living situation carry with it certain laws that are applicable to its treatment and well-being. While not all of these laws apply in all situations, and some are much more finite in their scope, they still form the baseline of protection for the treatment of a biologically resurrected animal.

1. The Animal Welfare Act (AWA)

The AWA is a statute that is administered by the Department of Agriculture (USDA), specifically through Animal and Plant Health Inspection Service (APHIS) and requires that humane treatment be afforded to certain animals in various settings.[45] APHIS implementing regulations make clear that not all animals are covered by the act. For example, "any other

[41] *See* Stuart L. Nightingale. Letter about Human Cloning, Oct. 26, 1998. Available at https://www.fda.gov/science-research/clinical-trials-and-human-subject-protection/letter-about-human-cloning.
[42] *See*21 U.S. Code § 360ccc.
[43] *See,* 21 U.S. Code §321(v).
[44] *See,* 21 USC §321(g)(1).
[41] [45] *See* APHIS. Animal Welfare Act. Available athttps://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa

warm-blooded animal" being used for research or experimentation is covered by the AWA but farm animals used for food are not covered. As such, if an extinct animal falls into the category of covered animals, it will indeed be covered by the AWA for at least if it lives in a research facility. While in the facility, the AWA requires conditions with respect to feeding, watering, sanitation, and the space the animal must roam.[46] Additionally, the research facility must meet certain requirements, such as maintaining an Institutional Care and Use Committee (IACUC) as well as hiring qualified personnel.[47] In particular, some animals are excluded, and others are specifically listed as being covered by the act. As such, the AWA requires that certain standards be followed when caring for biologically resurrected animals in a research laboratory.

2. The ESA

The ESA affects the conditions of biologically resurrected animals in two important and distinct ways. First, the ESA requires that a recovery plan be instituted to support the species' repopulation. While this paper has argued that the recovery plan may include cloning, such a process is not all that a recovery plan requires. The recovery plan should include a designated critical habitat, which is the geographic area where the animal lives.[48] However, the nature of biological resurrection is such that a habitat may no longer be in existence or the ecology of the geographic area where the species once lived may have changed drastically. As such, the option to acquire land for the creation of a critical habitat is indeed possible under the act.[49] Regardless of how the critical habitat is attained, or if another method of re-introducing the de-extinct animal into the wild is used, the recovery plan must consider how the habitat will allow for re-population of the animal.

Second, the ESA contains certain provisions prohibiting actions. For example, commercializing the animal, through exportation or other measures, in interstate commerce is

[46]*See,* 9 CFR Part 3. §3.129, §3.130; and §3.121.
[47]*See*, 9 CFR Subpart C. §2.31and §2.32.
[48]*See,* 16 USC §1532(5).
[49]*See,* 16 USC §1534,

clearly prohibited.[50] Additionally, it is prohibited to 'take' a covered animal.[51] The term "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[52] As such, extinct animals are broadly protected from many activities that may potentially hamper a de-extinction project.

3. Other Federal Laws

In addition to the ESA and AWA, there are other federal laws which are relevant to this discussion. The first of these laws is the 28-hour law. This law requires that animals transported for more than 28 hours have adequate access to water, feed, space, and adequate rest.[53] If a biologically resurrected animal is in transit, this statute does indeed apply, and a violation would result in a small civil penalty.[54] The second of these laws is the newly passed Preventing Animal Cruelty and Torture Act. This law provides for criminal liability if an animal, including a biologically resurrected animal, is crushed, recorded being crushed, or if the recording of a crushing is distributed.[55] Lastly, and perhaps most prominently, the Lacey Act imposes criminal liability on the important, exportation, sale, purchase, or transport of a species when it would violate state, federal, foreign, or tribal law.[56] This is an especially useful tool, considering that it works in tandem with the ESA to impose greater penalties on persons who would nefariously interfere with a biologically resurrected animal.

4. State Cruelty Laws

While the applicable laws discussed thus far have been federal, and therefore applicable to the nation at large, there are laws promulgated on a state-by-state basis which provide varying degrees of protection to animals, and therefore, would be applicable to biologically resurrected animals as well. For example, Maine "has a Courtroom Animal Advocate Program" and the

[50] *See* 16 USC § 1538(a)(1)(E); *See also* 16 USC § 1539 (certain facilities are exempt from prohibitions, such as if the transportation is used for scientific studies that promote the survival of the species).
[51] *See,* 16 USC §1538(a)(1)(B).
[52] *See,* 16 USC §1532(19),
[53] *See,* 49 USC §80502(a),
[54] *See,* 49 USC §90502(d).
[55] *See,* Public Law 116-72.
[56] *See,* 16 USC §3371-3378.

"animal care requirements are well-defined."[57] On the other hand, New Mexico's law does not prohibit sexual assault on animals.[58] This patchwork of laws may only be useful at the margins, for the federal laws may well require greater protection than the state offers, given the status of these animals as threatened or endangered. Yet, once these animals are introduced into the wild, these laws can be a useful tool in any animal lawyer's toolkit.

Part IV: Solving the Deficiencies in the Law

Upon surveying the law as it applies to the de-extinction project, it is evident that there are issues that must be addressed. Of course, it is true that de-extinction projects are not currently advanced to a point that requires immediate regulatory reform. However, the thrust of this section is to provide a framework from which regulators and legislators may draw from when they are met with the inevitable call for reform in this incredibly important arena.

a. Clarity in Classification of Extinct Animals under the ESA

Perhaps the most readily ascertainable deficiency within the ESA as it applies to extinct animals is whether an extinct animal can indeed qualify as threatened or endangered as this paper has argued. Guidance from the Secretary on this matter is pertinent, for it will likely shape industry efforts and ensure ex-ante compliance with the ESA in the de-extinction process. Yet, even if such guidance is released, there is still a hurdle to overcome. To receive protection under the ESA, the Secretary must list a threatened or endangered species.[59] However, in making the determination that the extinct animal belongs on such a list, there are several procedural elements that should be satisfied. For example, the Secretary must file a notice of the proposed regulatory determination ninety days before the regulation becomes effective.[60] This seems like a complete waste of effort that will only delay de-extinction projects and result in increased governmental

[57] *See,* ALDF. Maine. Available at https://aldf.org/state/maine.
[58] *See,* ALDF. New Mexico. Available at https://aldf.org/state/new-meixco.
[59] *See,* 16 USC §1553(c).
[60] *See,* 16 USC §1553(b)(5).

expenditure. The mere fact that a species is extinct should be prima facie evidence of the need to designate the animal accordingly. Perhaps one way to solve this issue would be to create a streamlined process for research facilities engaged in de-extinction projects to petition for threatened or endangered species classification prior to the actual cloning. If timed properly, this would immediately afford the animal the protections pursuant to the ESA.

b. FDA Guidance on the Use of Cloning in De-extinction

As discussed, the FDA's guidance on cloning is largely limited to the end result of the technology as is used in the food space. In other words, because clone meat and milk have been proven non-injurious to the public, the FDA's inquiry into the technology itself ceased to be relevant and was thus, for all intents and purposes, discontinued. If nothing else, prospect of cloning has major implications for human health, considering that some scientists view cloned pigs as the solution to a stable supply of organs for human transplant.[61] Yet, aside from the impact that cloned animals have on human health, the effect on animal health should be considered as well.

As of now, there is no rule that requires research facilities to clone in the way that best ensures the health of the cloned animal. Imagine if a cloned Wooly Mammoth was born in an incredibly disturbed or grotesque state merely because the cloning technology was maximized for cost rather than the health of the animal. Not only does this potentially reduce the incredibly limited supply of preserved cells from extinct animals, but it offends the human consciousness to even think about causing suffering to an animal that would quite possibly be the only one of its kind in the world merely to save a dollar. If the FDA requires certain cloning practices to be maintained, this issue can be avoided.

[61] *See* Karen Weintraub, *Meet the pigs that could solve the human organ transplant* crisis, Nov. 1, 2019. Available at https://www.technologyreview.com/2019/11/01/132110/meet-the-pigs-that-could-solve-the-human-organ-transplant-crises/.

c. Gap in Animal Care Protections

While a first glance, at the laws protecting de-extinct animals seem to be quite broad and sufficient, this is quite far from the truth. First, if we consider the scientific process and how important the preserved cells from an extinct animal are, it seems rather wild that there appears to be no special legal protection, aside from that found in traditional tort law, for the extinct animal's genetic material. Similarly, the AWA does not specify that cold-blooded animals are covered, and as such, biologically resurrected animals of the sort (e.g., dinosaurs) would potentially be devoid of the AWA's protections.[62] Second, while in the laboratory, the taking prohibition should indeed apply to extinct animals. Furthermore, it is possible that the private right of action in the ESA means that there is at least no standing issue that gets in the way of helping one of these animals as they are living in a research lab.[63] However, the AWA is notoriously underenforced and, especially with respect to biologically resurrected animals, the very finite nature of their existence beckons as much protection from both the AWA and ESA as possible.[64] On a similar note, some states have banned human cloning practices.[65] Perhaps it is too naïve to expect these states to enforce laws in favor of protecting cloned animals when it appears as though their public policy is against cloning in the first instance.[66] The underenforcement of the AWA and the fractured state ideology with respect to cloning necessitates that a stricter enforcement regime be put into action minimally with respect to de-extinction projects, and ideally, covering all animals.

d. Creating a New Agency

[62] *See,* 9 CFR §1.1.
[63] *See,* 16 USC §1540(g).
[64] *See* ASPCA. *USDA Enforcement of Animal Welfare Act Continues to Plummet*. Mar. 11, 2020, available at aspca.org/news/usda-enforcement-animal-welfare-act-continues-plummet
[65] *See* The Witherspoon Council. *The Threat of Human Cloning. Summer 2015*. Available at https://www.thenewatlantis.com/publications/appendix-state-laws-on-human-cloning.
[66] *Id.*

Perhaps these issues require the creation of a new agency with the relevant expertise to assist with de-extinction projects. After all, biological resurrection clearly does not fit squarely within the ESA, the FDA or USDA's statutory authority. Furthermore, as previously discussed, de-extinction has many accompanying advantages and disadvantages. It may be that each de-extinction process would need to be evaluated carefully with respect to these issues. Any agency dedicated to supporting de-extinction would need the proper expertise in cellular biology, conservation, environmental and ecological systems, and humane treatment of animals. No existing agency contains such a gamut of professionals. While the ESA allows the Secretary to appropriate expertise from outside agencies to accomplish the goals laid out in the statute, more would be gained from a centralized institution where the very goal of de-extinction is the sole purpose for the agency's existence. This would also enable the various disciplines to work efficiently in tandem.

CONCLUSION

Ultimately, while it is possible for de-extinction projects to be regulated under the current law, the legal regime, as is, fails extinct animals. Whether it be through modification of regulations issued under current law, or the passing of new legislation, there are simple solutions that can be adopted to fix the chinks in the legal armor. Yet, one aspect that this paper did not consider, was the international and global nature of this issue. De-extinction projects, as evinced by the earlier case studies, are currently underway worldwide. In fact, the founder of the largest cloning facility in China has said that cloning can be used to rescue endangered species.[67] Furthermore, the ESA clearly contemplates a respect for the international community in this area, and perhaps an international solution to de-extinction would be incorporated into the

[67] *See* Tom Phillips, *Largest animal cloning factory can save species, says Chinese founder*, Nov. 24, 2015. Available at https://www.theguardian.com/world/2015/nov/24/worlds-largest-animal-cloning-factory-can-save-species-says-chinese-founder

ESA.[68] As the brilliant American scientist Benjamin Franklin pointed out: an ounce of preventative is worth a pound of cure.[69] Given the intense desire to engage in de-extinction efforts, as evinced by scientists working in the field, the thoughts, issues, and solutions evoked by this paper will be an invaluable tool when legislators and regulators are eventually faced with question of whether the legal landscape is sufficient and if so, how it should be changed.

[68] *See* 16 U.S. Code § 1531(a)(4).
[68] [69] Words and their Stories. *'An Ounce of Prevention Is Worth a Pound of Cure'*, Mar. 14, 2020, available at https://learningenglish.voanews.com/a/an-ounce-of-prevention-is-worth-a-pound-of-cure-/5326585.html

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